# QUARTERLY REPORT

## of the

# ATTORNEY GENERAL

## of

# ALABAMA

**For the Period:**
**From April 1, 1939**
**Through June 30, 1939**
**Volume XV**

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TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act No. 50 House Bill 225 approved February 21, 1939, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from April 1, 1939 through June 30, 1939.

The Act referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Act also provides a copy of said report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
THOMAS S. LAWSON,
Attorney General.

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# OPINIONS

April 7, 1939

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Taxation—Board of Equalization—

The Board of Equalization is selected by the Commissioner of Revenue from three groups of names presented by the county governing body, the county board of education and municipalities of a county, respectively. In counties where selection of county personnel is governed by a merit or civil service law, the groups or names are submitted in the same manner as in other cases, except that the persons submitted must first qualify under such merit or civil service law.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 27, 1939, in which you request my opinion as follows:

"A question has arisen as to the proper interpretation of that part of Section 2 of Senate Bill 14 which reads as follows:

" 'In all counties where the selection of the county personnel is governed by a merit or civil service law, the persons submitted by the County Board of Education, the County Commission or other governing body of the county and the municipalities of the county, when submitted as in this Act provided, the Director of Personnel of the county under the direction of the Personnel Board shall with all reasonable dispatch examine such persons in accordance with the merit or civil service law of the county and from such examination make up an eligible list and certify such list to the State Commissioner of Revenue and from such list the County Board of Equalization shall be named, naming one member from each group as in other counties.'

"In view of the fact that all remaining provisions of the Act contemplate that the Commissioner of Revenue shall have submitted to him from the County Board of Education of each county a group of three persons and from the governing body of each county a group of three persons and from the governing body of each municipality a group of three persons, it appears that the above quoted section can only be interpreted to mean that in those counties where the selection of the county personnel is governed by civil service there shall be submitted to the Commissioner of Revenue by the county governing body the names of three persons and by the county school board the names of three persons and by the governing body of each municipality the names of three persons, all of whom have met the qualifications required by the Personnel Board in addition to the other qualifications set out in the Act.

"The last clause found in the above quoted section is as follows: 'naming one member from **each group** as in other counties'. It is plainly

indicated that the Act contemplates that there shall be a group of persons nominated by the County Board of Education, by the county governing body, and by the municipality.

"Some have suggested that the governing bodies above named should each submit to the Personnel Board three names of persons who are required to stand the civil service examination, and if none pass the examination then other names were to be submitted until at least one from each group passes the examination. This procedure would have for its effect transferring the power of selection to the Personnel Board rather than to the Commissioner of Revenue as contemplated by the Act.

"If you concur in the opinion of this Department that there must be three names of qualified persons submitted to the Commissioner of Revenue from each of the governing bodies then please advise whether in your opinion the names are first to be selected by the governing bodies before the Personnel Board of the County gives the examination or whether all prospective nominees may be examined by the Personnel Board in order that the governing bodies may select their choice of three from the qualified applicants. In other words, state your opinion as to the proper procedure for the determination of the names of those who are to be examined by the Personnel Board.

"We find nothing in the Act to prevent the Personnel Board from giving the examination to all persons who are seeking appointment to the Board and from the eligible list thus obtained the governing bodies would be free to make their selections of nominees for certification to this office. We would thank you to answer the above inquiry fully at your very earliest opportunity."

In answer to your inquiry, I am of the opinion that you have placed a correct interpretation on the last sentence of Section 2 of the act under consideration.

Section 2 of Act No. 143, S. B. 14, approved March 15, 1939, provides as follows:

"Within thirty days after the passage of this Act, the Court of County Commissioners, or other governing body, the County Board of Education of each County, and all of the municipalities in each county, shall each submit in writing, to the State Commissioner of Revenue, the names of three persons, all of whom shall have been for at least five years residents of the County, and who are each owners of real estate subject to taxation located in the county for which they are appointed, and who are each qualified electors in said County, and who are, in the opinion of said nominating body, persons competent to serve as members of the County Board of Equalization. In those counties where there is no incorporated municipality the Court of County Commissioners or other governing body of said County shall nominate six persons as competent persons for appointment to membership on such Board of Equalization. From each group of three nominees, submitted by the County governing body and the County Board of Education, and from the total group of nominees submitted by the governing bodies of the municipalities, the Commissioner of Revenue, with the approval of the Governor, within thirty (30) days after receipt of such lists of nominees, shall appoint one person

to membership on the County Board of Equalization, so that the membership of each of said Boards shall be composed of three members, one of whom was nominated by the governing body of the County, one by the County Board of Education, and one by the governing body of the incorporated municipalities in the County, except, however, that in those Counties having no incorporated municipality, two of the members of the said Board shall be selected from the six nominees of the County governing body. The members of the several County Boards of Equalization appointed from the nominees as in this section provided shall hold office from the date of qualification, and their terms of office shall expire on September 30, 1943. In all counties where the selection of the county personnel is governed by a merit or civil service law, the persons submitted by the County Board of Education, the County Commission or other governing body of the county and the municipalities of the county, when submitted as in this Act provided, the Director of Personnel of the county under the direction of the Personnel Board shall with all reasonable dispatch examine such persons in accordance with the merit or civil service law of the county and from such examination make up an eligible list and certify such list to the State Commissioner of Revenue and from such list the County Board of Equalization shall be named, naming one member from each group as in other counties."

It will be seen from a careful reading of the above-quoted section (excluding the last sentence thereof) that generally there are three groups of names for each county to be submitted to the Commissioner of Revenue, viz: (1) three names submitted by the county governing body, (2) three names submitted by the county board of education, and (3) three names submitted by each municipality in the county. Out of each of the three groups submitted, the Commissioner of Revenue selects one person from each group respectively as members of the Board of Equalization of a county. However, if there is no incorporated municipality in a county, the county governing body submits six names. In such a situation there would be only two groups, that is, six names submitted by the county governing body and three names submitted by the county board of education. Out of the six submitted by the county governing body, two are selected, and out of the three submitted by the county board of education, one is selected.

The question now presents itself as to whether or not the last sentence of Section 2 above-quoted affects the above interpretation of the other part of said section. In my opinion, this question should be answered in the negative. Said last sentence merely provides that the persons submitted in each group respectively qualify under the merit or civil service law in counties which are governed by same. In other words, in those counties where the selection of the county personnel is governed by civil service there shall be submitted to the Commissioner of Revenue by the county governing body the names of three persons, and by the county board of education the names of three persons, and by each municipality the names of three persons, all of whom have met the qualifications required by the Personnel Board in addition to the other qualifications set out in the act.

The last clause found in the above-quoted section is as follows: "Naming one member from each group as in other counties." This, in my judgment, clearly indicates that the act contemplates that there shall be a group of persons submitted by the county governing body, the county board of education and by the municipalities in the county, all respectively. To hold otherwise would have the effect of transferring the power of selection to the

Personnel Board rather than to the Commissioner of Revenue as contemplated by the act.

In answer to your inquiry as to whether the names are first to be selected by the governing bodies before the Personnel Board of the county gives the examination or whether all prospective nominees may be examined by the Personnel Board in order that the governing bodies may select their choice of three from the qualified applicants, it is my opinion that this may be done in the manner that would be most convenient to the governing bodies and the Personnel Board. The act is silent as to the method to be followed in this respect. Whether the nominees of the governing bodies qualify with the Personnel Board before or after their selection is immaterial so long as they qualify with the said Board before their names are submitted to the Commissioner of Revenue in the manner above outlined.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 11, 1939

Hon. John D. Petree,
Director of Industrial Relations,
Montgomery, Alabama.

The Director of Industrial Relations has authority to requisition from the Unemployment Trust Fund maintained for the State of Alabama in the United States Treasury necessary amounts for the payment of unemployment compensation benefits.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your request under date of April 10, 1939 as follows:

"I respectfully request your opinion as to whether I, as Director of Industrial Relations for the State of Alabama, have authority to requisition from the 'Unemployment Trust Fund' maintained in the Treasury of the United States Government necessary amounts for the payment of Unemployment Compensation benefits."

It is my opinion that you, as the Director of Industrial Relations or your successor in office, have full authority to requisition from the Unemployment Trust Fund maintained for the Alabama Unemployment Compensation Agency in the United States Treasury such amounts from time to time as you deem necessary for the payment of unemployment compensation benefits.

Section 9 of Act No. 447, General Laws of Alabama, Acts of 1935, page 950, provided:

"There is hereby created a Commission of three members to be known as the Unemployment Compensation Commission of Alabama."

Section 3(d) of said Act provided:

"All contributions paid under this Act shall upon collection be deposited in or invested in the obligations of the 'Unemployment Trust Fund' of the United State Government or its authorized agent, so long as said Trust Fund exists, notwithstanding any other statutory provision to the contrary. The Commission shall requisition from the Unemployment Trust Fund necessary amounts from time to time."

Section 8 of House Bill 51, known as the Industrial Relations Act of 1939, approved March 14, 1939, abolished the Unemployment Compensation Commission of Alabama and provided:

"All of its functions and duties under and in the administration of the Unemployment Compensation Act, Act No. 447, General Laws of Alabama, approved September 14, 1935, Acts of 1935, pages 950-967***** as amended, are conferred upon the Director of Industrial Relations or his legally authorized representative as of the date specified in the declaration filed by the Governor with the Secretary of State, which declaration is provided for in Section 5 of this Act* * *" etc.

The records in the office of the Secretary of State contain a declaration filed by the Governor on April 7, 1939, which declaration specifies the tenth day of April, 1939 as being the date on which the transfer of the duties and functions of administering the Unemployment Compensation Law to the Director of Industrial Relations shall become effective.

Section 10(b) of said Industrial Relations Act of 1939 provided for the transfer of the Unemployment Compensation Fund of the Unemployment Compensation Commission of Alabama to the Department of Industrial Relations, to be administered by the Director of Industrial Relations, the said transfer to be effective as of the date specified by the Governor in a declaration filed by him with the Secretary of State, which declaration is mentioned hereinabove.

It is readily seen that inasmuch as the Director of Industrial Relations has assumed all of the functions and duties heretofore reposing in the Unemployment Compensation Commission of Alabama, and the said Commission itself had full authority to requisition such funds herein described, the Director of Industrial Relations has full authority to requisition from the Treasury of the United States Government amounts from the Unemployment Trust Fund maintained therein for this State as are necessary from time to time to pay unemployment compensation benefits.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 12, 1939

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Sheriffs—Costs and Fees—

1. Sheriff of Mobile County may collect fees from the county fund which has been consolidated with the Fine and Forfeiture Fund of Mobile County for services rendered in the Inferior Criminal Court of Mobile County in those cases where the defendant has been acquitted or in cases where the State has entered a nolle prosequi or in cases abated by the death of the defendant.

Opinion by the Attorney General.

Dear Sir:

This is to acknowledge receipt of your request for opinion under date of February 2, 1939, which is as follows:

"Please refer to Local Act creating the Inferior Criminal Court of Mobile (Local Acts 1898-99, page 1164) and amendments thereto and advise me as follows:

"1. When a defendant is acquitted, the case nolle prosequi or abated by death, etc., in such Court, would the fees of the Sheriff be a legal claim against the Fine & Forfeiture Fund?"

The right of a sheriff to receive fees for services rendered in criminal cases in circuit and county courts is not abrogated by the fact that the defendant is acquitted or in cases where the State has entered a nolle prosequi or in cases abated by the death of the defendant. This right is specifically given and the manner of collection provided for by statutes dealing with fees of county officers.

Section 3740, Code of Alabama, 1923, is as follows:

"Section 3740. Costs, how taxed and collected.—Of the fees specified in the preceding section, such as accrue on a forfeiture against a defaulting juror, witness, or bail, must be taxed as costs, and collected under execution against such witness, juror, or bail, unless excused therefrom by the court; and all other specified fees for such services as are rendered in the case must be taxed as costs against the defendant, on conviction, or against the prosecutor, as provided by Section 8684 (7302), and collected by execution; **and in all trials in the circuit courts, or county courts, where the state fails to convict, or the indictment abates, or is nol. prossed, or withdrawn, the fees of the sheriffs and clerks of the courts shall be paid out of the fine and forfeiture fund;** but the sheriffs and clerks must make affidavit before the circuit, or probate judge of the amount due them; and the right of the sheriffs and clerks to such payment of their fees shall be postponed to the rights of state witnesses, as they now exist." (Italics supplied).

Section 4039, Code of Alabama, 1923, is as follows:

"Section 4039. Surplus of fund to pay officers.—Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the county Treasurer of such county must pay the fees of the officers of the court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found', or in cases in which the state enters a nolle prosequi, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, unless the payment or distribution of such funds are otherwise provided for. This section shall be held to apply to all fees of officers of the trial court arising on an appeal by the defendant to the supreme court or the court of appeals, in cases where the judgment of the trial court is reversed and a new trial allowed, or the defendant ordered discharged. It shall also apply in appealed cases, where the defendant has appealed from conviction and sentence to the state penitentiary, and the conviction is affirmed, to such part of the fees of the officers of the trial court, arising on the appeal, as are not paid from the convict fund under sections 3667 and 3668 of the Code, an execution for such unpaid part of such fees having first been issued against the defendant and returned 'no property found.' It shall further apply to the fees of the officers of the trial court, arising on an appeal, in cases where the defendant has appealed from a conviction, the punishment fixed being otherwise than imprisonment in the state penitentiary, and the judgment of the trial court is affirmed, provided the defendant be first proved insolvent by the return of the execution 'no property found.'"

There can be no question of the fact that the sheriff of Mobile County is charged by law with the duty of performing certain services for the Inferior Criminal Court of Mobile County. I refer you to Act No. 88, approved October 12, 1932 (Local Acts 1932, page 35). The pertinent part of said act is as follows:

"Be it further enacted that said judge or clerk of the said inferior criminal court shall address all processes of whatever nature or kind to the sheriff of Mobile county, who shall either himself or by deputy execute the same. When required by the said judge, the said sheriff shall furnish a bailiff for the said inferior criminal court. **The sheriff shall receive and be paid as compensation for the services required of him and for furnishing the bailiff, the same fees prescribed for the sheriff by the general law for the performance of such services."** (Italics supplied).

The question then presents itself as to whether or not the inferior criminal court of Mobile County is such a court as is referred to in Section 4039, Code of Alabama 1923, supra.

It is my judgment that this question has in effect been answered in the affirmative by the Supreme Court of this State in two opinions. It is true that the Inferior Criminal Court of Mobile County has mainly the jurisdiction theretofore exercised by justices of the peace In the case of **Cabler vs. Mobile County,** 230 Ala. 118, 159 So. 692, it was held that fees of justices of

the peace of Mobile County are not payable out of the Fine and Forfeiture Fund of the consolidated fund of that county.

In a later case of **State ex rel Holcombe, Sheriff, vs. Stone, County Treasurer**, 166 So. 602, 232 Ala. 16, fees of justices of the peace and the Sheriff of Mobile County are distinguished in that this case holds that the Sheriff of Mobile County is entitled to fees out of the General Fund of Mobile County, which has been consolidated with the Fine and Forfeiture fund of that County, for services rendered in justice of the peace courts of that county in enforcing the prohibition laws.

If the Sheriff of Mobile County is entitled to receive fees from such fund of the county for services rendered in cases in the justice of the peace courts of the county, it naturally follows that he is entitled to fees from the same source for services rendered in the Inferior Criminal Court of Mobile County, which has in the main the same jurisdiction as justices of the peace in certain precincts in that county.

I call to your attention the case of **Herman v. Mobile County**, 202 Ala. 274, 180 So. 112, in which Mr. Justice Thomas of the Supreme Court of this State held that the ex officio clerk of the Inferior Civil Court of Mobile was entitled to collect fees out of the consolidated fund of Mobile County in cases brought in that court for the condemnation of prohibited liquors. The Inferior Civil Court of Mobile County had mainly the same jurisdiction in civil cases as had theretofore been exercised by justices of the peace within certain precincts of the County. It is my opinion that this decision of the Supreme Court definitely upholds the right of the sheriff to collect fees from the consolidated fund of Mobile County for services rendered in criminal cases in the Inferior Criminal Court of Mobile County.

I would like to refer you also to the case of **State ex rel. Holcombe, Sheriff, v. Stone, County Treasurer**, 157 So. 452, 26 Ala. App. 226, 157 So. 454. In this case the Sheriff of Mobile County brought a mandamus suit against the Treasurer of Mobile County seeking the payment of fees from the consolidated fund of Mobile County for services rendered in connection with the seizure of contraband liquor in cases in the Inferior Criminal Court of Mobile County. The Court of Appeals held as follows:

> "The claim of the Sheriff of the sum of $1317 for fees due him under Section 4768 of the Code was allowed and ordered to be paid on May 27, 1932, by the Judge of the Inferior Court of Mobile County, and on that day said claim for said sum of $1317 became a charge against the treasury of Mobile County and payable on the order and its presentation."

The Supreme Court in an opinion written by Chief Justice Anderson denied a petition for writ of certiorari and said as follows:

> "Upon a failure to make the cost and fees, they become a charge against the fine and forfeiture fund upon an order of the judge or magistrate. Here, against the general fund of Mobile County because of a consolidation or merger of the fine and forfeiture fund into the general fund."

In view of the decision above referred to, I am of the opinion that the Sheriff of Mobile County may legally collect fees from the consolidated fund

of Mobile County for services rendered by him in criminal cases in the Inferior Criminal Court of Mobile County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 14, 1939

Hon. G. Claiborne Blanton,
County Commissioner,
The Court of County Revenues,
Dallas County,
Selma, Alabama.

Taxation—Boards of Equalization—

Compensation of members of County Boards of Equalization is governed by Section 9 of Act No. 143, S. 14, approved March 5, 1939, "At the rate of $600.00 each, per annum, payable in four monthly installments" as used in part of said section, means total annual compensation of $600.00 payable in four installments of $150.00 each.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 5, 1939, in which you request my opinion as follows:

"Some of our local officials differ about the amount of salary to be paid to the newly appointed Board of Review in Dallas County, under the terms of Senate Bill 14, recently enacted. Our county has an assessed valuation of $17,900,000. We therefore come in the bracket between $15,000,000 and $25,000,000. The difference of opinion locally is in the wording as follows:

"and for such services shall be paid **at the rate** of six hundred dollars (600.00) each, per annum, payable in four monthly installments.

"Some of our local attorneys argue that the rate of six hundred, would be $50.00 per month and they can service only during the months of March, April, June and July. We have informed our people that they would be paid $150.00 per month for the four months.

"Would you please, therefore, render me an opinion for use in this County as follows:

"What amount of salary will be paid the newly appointed Board of Review in Dallas County, under the terms of Senate Bill 14?"

By the term "Board of Review", as used in your letter, I presume you mean Board of Equalization under Act No. 143, S. 14, approved March 5, 1939.

In answer to your inquiry, I am of the opinion that the members of the Board of Equalization for Dallas County, when duly appointed, will receive $600.00, each, per annum, which is payable in four monthly installments of $150.00 each on the last day of March, April, June and July, respectively.

Section 9 of the Act under consideration provides in part as follows:

> "Sec. 9. The annual term of service and compensation of the members of the several County Boards of Equalization, as created by this act, shall be as follows: * * * In those Counties in which the total assessed value of all taxable property exceeds fifteen million ($15,000,000) but does not exceed twenty-five million dollars ($25,000,000), according to the tax assessor's abstract of assessments for the year 1938, the members of the County Board of Equalization shall serve during the months of March, April, June and July of each year, and such other times as the members of the County Boards of Review shall have heretofore been required to serve, and for such services shall be paid **at the rate of six hundred dollars ($600) each, per annum, payable in four monthly installments.** * * *" (Italics supplied).

"At the rate of $600 each, per annum," in my opinion, clearly refers to the annual compensation to be paid each member. "Payable in four monthly installments" refers to the method of payment. The reason for this method of payment was evidently due to the fact that the members of the boards in this bracket served during the months of March, April, June and July. Therefore, the monthly installment should be paid at the end of each of these months, respectively. It will be noted that the service of the board in question is not limited to these four months, but it "shall serve at such other times as the members of the County Boards of Review shall have heretofore been required to serve." This negatives the idea that the members of the board receive only $50.00 each, per month, for the months of March, April, June and July, respectively.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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April 15, 1939.

Hon. Richard C. Foster, President,
University of Alabama.
University, Alabama.

Colleges and Universities—

1. Board of Trustees of the University of Alabama held to have had authority to adopt resolutions dated December 21, 1938 authorizing the issuance of $460,000 Dormitory Revenue Bonds, and dated April

14, 1939, reducing interest rate of said bonds from four to three and one-half percentum and selling said bonds to Robinson-Humphrey Company at face value thereof and accrued interest.

2. Said bonds held duly and validly issued by due and proper proceedings of the Board of Trustees of the University of Alabama, and to constitute valid obligations on the part of the Board of Trustees of the University of Alabama, payable upon maturity solely out of the gross revenues derived from the buildings to be erected with the aid of the funds derived from the sale of the bonds.

3. Board of Trustees of the University of Alabama held to have had legal authority to sell said bonds to the Robinson-Humphrey Company, a private purchaser.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 14, 1939, in which you request my opinion as follows:

"The Board of Trustees of the University of Alabama has by resolutions adopted December 21, 1938, authorized the issuance of $460,000. Dormitory Revenue Bonds bearing interest at the rate of four per cent per annum, payable semiannually, to aid in the financing of the construction of seven dormitory buildings on the campus of tthe University of Alabama. Forty-five per cent of the cost of the buildings has been contributed to the Board of Trustees by the Federal Emergency Administration of Public Works (P. W. A.), and the purpose of the bond issue, as stated, is to provide funds to cover the balance of the cost of constructing and furnishing the buildings.

"The Bonds so authorized are to be retired solely out of the revenue derived from dormitory rentals of the buildings, and by the provisions of the resolutions and by their terms the bonds are not obligations of any nature whatsoever of the State and are not payable out of any monies provided for or appropriated by the State to the University of Alabama.

"The Board of Trustees in authorizing said bond issue purported to act under the authority granted to it by an Act of the Legislature (Gen. Acts of Alabama, 1935, page 1064).

"The Board of Trustees has also authorized by resolutions adopted on April 14, 1939, a reduction in the rate of interest provided for in said bonds from four per cent to three and one-half per cent, and a sale of $418,000.00 of the said issue to the Robinson-Humphrey Company, Rhodes-Haverty Building, Atlanta, Georgia, at face value and accrued interest. The Board of Trustees in adopting the resolutions on April 14, 1939, purported to act under authority of said Act of the Legislature of 1935, page 1064, as amended by the 1939 Special Session of the Legislature of Alabama.

"Will you please examine the said proceedings of the Board of Trustees and advise me as follows:

"(1) Whether or not the Board of Trustees had authority to adopt said resolutions.

"(2) Whether or not the said bonds have been validly issued by due and proper proceedings of the Board of Trustees.

"(3) Whether or not the bonds constitute valid obligations on the part of the Board of Trustees to pay the bonds out of a fixed portion of the gross revenues to be derived from said buildings.

"(4) Whether a sale by the Board of Trustees of said bonds to a private purchaser was valid."

In accordance therewith, I have examined the proceedings of the Board of Trustees of the University of Alabama authorizing the issuance of $460,000 Dormitory Revenue Bonds, payable solely out of the gross revenues derived from the buildings to be erected with the aid of the funds derived from a sale of the bonds, and the proceedings selling $418,000 of the bonds to the Robinson-Humphrey Company, Rhodes-Haverty Building, Atlanta, Georgia, at the face value thereof and accrued interest.

The bonds by their express terms are not obligations of the State of Alabama and are not payable out of any moneys provided for or appropriated by the State of Alabama to the University of Alabama.

The validity of the proceedings in question is determined by an Act of the Legislature of Alabama, General Acts of Alabama, 1935, page 1064, approved September 13, 1935, as amended by Act No. 6, General Acts, Special Session, 1939, approved March 29, 1939. This act (prior to the amendment) has been judicially interpreted and proceedings similar to the instant proceedings of the Board of Trustees of the University of Alabama have been approved by the Supreme Court of Alabama in the case of **Keller v. State Board of Education,** 236 Ala. 400, 183 So. 268. In that case, the Supreme Court of Alabama, speaking through Mr. Justice Thomas, held that the act in question vested valid authority in the governing bodies of State educational institutions to issue such bonds.

The proceedings of the Board of Trustees of the University of Alabama in authorizing the issuance of $460,000 Dormitory Revenue Bonds and the proceedings selling $418,000 of said bonds to the Robinson-Humphrey Company, Rhodes-Haverty Building, Atlanta, Georgia, at the face value thereof and accrued interest are regular and in the form and manner approved by the Supreme Court of Alabama in **Keller v. State Board of Education,** supra.

On the basis of the decision of the Supreme Court in the case of **Keller v. State Board of Education,** supra, and other authorities cited in the opinion, this office in an opinion to Dr. A. F. Harman, President, Alabama College, Montevallo, Alabama, under date of September 29, 1938 (Quarterly Report of Attorney General, Vol. XII, p. 209) held that such bonds might be sold to private individuals or private investment brokers. However, that they can now be sold to private individuals or private investment brokers as well as to governmental agencies is sure and certain. By the amendatory act of the Special Session of 1939, supra (which examination reveals is the only act passed by the Legislature of Alabama in 1939 during the portion of the

Regular Session which has already been held and the Special Session which has already adjourned that touches, affects, or deals with this general subject in any way whatsoever), the original act was changed to specifically authorize the issuance and sale of such bonds to private purchasers as well as to governmental agencies. In my opinion, said amendatory act was validly enacted and invests the Board of Trustees of the University of Alabama with authority (if it was not already invested with such authority) to sell said bonds to a private purchaser or private purchasers.

The premises considered, I advise you as follows:

1. That the Board of Trustees of the University of Alabama was invested with legal authority to adopt said resolutions dated December 21, 1938, authorizing the issuance of $460,000 Dormitory Revenue Bonds, and dated April 14, 1939, reducing the interest rate of said bonds from four to three and one-half percentum and selling the same to Robinson-Humphrey Company at face value thereof and accrued interest.

2. That said bonds were duly and validly issued by due and proper proceedings of the Board of Trustees of the University of Alabama, and constitute valid obligations on the part of the Board of Trustees of the University of Alabama, to be paid upon maturity out of a fixed portion of the gross revenues to be derived from the buildings to be erected with the aid of the funds derived from a sale of said bonds.

3. That the sale of said bonds to the Robinson-Humphrey Company, a private purchaser, was valid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 15, 1939.

Hon. G. D. Broom,
Superintendent of Education,
Cherokee County,
Centre, Alabama

County Boards of Education—Traveling expenses and meals.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated March 20, 1939, which is as follows:

"Please render an opinion on amount of mileage allowed a county board Member coming and going to board meeting, how much per mile.

"Also render an opinion where a county board member that lives at the county site is allowed his lunch while attending meetings."

In answer to your request, I refer you to Section 92 of the School Code of 1927, which reads as follows:

"92. Compensation of County Board.—The members of the County Board of Education shall receive from the public school funds of the County five dollars a day and their actual traveling and hotel expenses incurred in attending meetings of the Board, and transacting the business of the Board. The members of the County Board shall not be allowed pay for more than twelve days in any one year, and their expenses shall be paid in like manner as provided for the compensation of teachers. They shall not be required to hold teachers' certificates."

You will note from the above that the members of County Boards of Education are allowed their **actual** traveling expenses and no mention is made for traveling expenses on a per-mile basis.

The above quoted section of the Alabama School Code of 1927 provides for the allowance of hotel expenses actually incurred by members of County Boards of Education on attending meetings. It is my opinion that a member of the County Board of Education, who lives at the County Seat, would be entitled to an allowance for lunch, if such expense was actually incurred.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 15, 1939.

Hon. J. B. Van Valkenburgh, Chairman,
Madison County Board of Commissioners,
Huntsville, Alabama.

Board of County Commissioners may accept an indemnity bond for protection against lost bonds or interest coupons.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of March 30, 1939, in which you request my opinion as follows:

"Enclosed find Bond which has been tendered our Board of County Commissioners to protect the County General Fund in the payment of $562.50 of coupons on Madison County Bonds that were lost in transit between The Chase National Bank of New York City and our office and which were transmitted through one of our local banks.

"Will you give us an opinion as to the legality of our paying these coupons with bond protection?

"The reason for this request is that our County Attorney also happens to be the attorney for The First National Bank and of course, should there be any future developments, he being attorney for both parties, would be criticized."

In answer to your inquiry, I wish to advise that this appears to be a matter of administration. However, I see no objection to the Board paying for these lost coupons and taking an indemnity bond for protection.

I call your attention to an opinion of this office rendered on July 5, 1934, to Hon. J. H. Hard, Jr., Comptroller, a copy of which is herewith enclosed. In my judgment the enclosed opinion is in point with the question with which you are confronted.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 15, 1939.

Hon. W. H. Hubbard, Judge,
City Court of Jasper,
Jasper, Alabama.

Judge of the City Court of Jasper, Walker County, Alabama, not entitled to five percent commission for collecting and remitting money to the State of Alabama.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your request for official opinion of March 23, 1939, which is as follows:

"The 1911 Legislature established by local act the City Court of Jasper, Walker County, in Beat 1 to replace the two Justices of the Peace and all Ex-Officio Justices of the Peace.

"This Court handles a number of Highway Patrol cases, with all fines going to the State.

"When this class of cases are tried in the County Court or Circuit Court, the Clerks of those Courts are paid a commission which they deduct when they make their remittances to the State.

"In my Court there is no Clerk other than myself. Is there any provision in the law whereby I could be paid a commission for the handling of these fines the same as the Clerk in the higher courts."

My answer to your request is in the negative. I call your attention to an Act approved July 28, 1931, General Acts 1931, page 669, which is as follows:

"Section 1. That the Clerks and Registers of the several Circuit Courts of the State of Alabama shall receive five per cent of any sum or sums collected by such Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such Clerk or Register making the collection from such sum or sums collected."

You will note that the above specifically designates clerks and registers of the several circuit courts of Alabama as being the officers entitled to this commission.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 15, 1939.

Hon. Roy D. McCord,
Member of the Legislature,
Gadsden, Alabama.

Statutes—A local act in the form of a relief act, which is properly advertised, properly drawn as to form and substance and properly passed by the Legislature, authorizing a county board of education to assume an obligation of a municipality, which obligation is not a legal obligation of the county board of education but a moral one, would be constitutional.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 25, 1939, in which you request my opinion as follows:

"It is necessary that I have your opinion on the following question:

"Would a local bill granting the Etowah County Board of Education the permissive right to assume an obligation of the City of Attalla for a Twenty thousand Dollar ($20,000.00) bond issue now outstanding, same being issued for the building of the Etowah County High School at Attalla, under the 1907 County High School Act. It being the purpose and objective of the City of Attalla to use this relief in the building of the City School building for the City of Attalla."

In answer to your inquiry, it is my opinion that a local act in the form of a relief act, which is properly advertised, properly drawn as to form and substance and properly passed by the Legislature, effectuating the purpose set out in your inquiry would be constitutional.

In an opinion of this office rendered to the County Superintendent of Education of Etowah County, it was held that a county board of education has no legal authority to assume the payment of bonds issued by a city for building a high school under Acts 1907, page 728, and Acts 1909, Special Session, page 230, and subsequent amendments thereto. Although there may be no legal obligation on the part of the county board of education to assume payment of such bonds, yet the proceeds of the bonds were used for the erection of a school building and there devolved upon the county board of education a moral obligation.

A relief bill in the nature of the one mentioned in your inquiry would have the effect of reimbursing a city for monies expended for schools of the county. As above stated, there is no legal obligation to make such reimbursement, but there is a moral one. The courts will assume that the Legislature acted in good faith, in enacting a statute of reimbursement in recognition of a moral obligation, and such an act would not be violative of Section 94 of the Constitution. **Lee v. City of Decatur,** 233 Ala. 411, 172 So. 284; **Moses v. Tignor,** 232 Ala. 457, 168 So. 194; **Board of Revenue and Road Commissioners of Mobile County v. Puckett,** 277 Ala. 374, 149 So. 850.

The above citations are based on the case of **State v. Clements,** 220 Ala. 515, 126 So. 162. In said case the court laid down the following rule:

"An appropriation made in discharge of a moral obligation resting upon the State must be regarded as being for a public purpose and within the constitutional powers of the Legislature, and the fact that a private person may receive the benefits of such an appropriation does not constitute the act of appropriation a private one."

Relief acts in the form of local acts, which are otherwise constitutional, have been upheld. **Moses v. Tignor,** supra; **Board of Revenue and Road Commissioners of Mobile County v. Puckett,** supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 15, 1939.

Hon. H. R. Denton,
Treasurer, Blount County,
Oneonta, Alabama.

County official prohibited under Section 5016 of the 1923 Code from buying claims against the county.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of March 23, 1939, in which you request my opinion as follows:

"I would like to have your opinion on the following,

"Section 5016—in case where the county has no fine and forfeiture fund, also the county treas. office does not pay the claims, and there is no way provided for such payment only thru selling the claims for what the holder may get, then would it be a violation of the law for a county official to buy said claims.

"The above has reference only to claims against the fine and forfeiture fund which this county does not have a fund for payment of such funds."

In reply to your inquiry, I wish to advise that it must be answered in the negative. Your attention is called to Section 5016 of the 1923 Code, which reads as follows:

"5016. Dealing in county claims by county officers.—Any public officer or deputy, assistant, or clerk thereof, who, directly or indirectly, by himself or through another, purchases, deals or traffics, in any manner whatever, **in any claim payable out of the county treasury,** or out of the fine and forfeiture fund of the county, must, on conviction, be fined for each offense not less than ten nor more than fifty dollars; but nothing contained in this section prevents any officer from receiving in good faith any county claim in payment of a debt due him. This section must be given in charge to the grand jury; and the solicitor is required to summon the county treasurer before the grand jury to give evidence against any one for a violation of this section." (Emphasis supplied).

Your attention is also called to the following opinions of this office: Biennial Report of Attorney General, 1926-1928, pages 252 and 475; Biennial Report of Attorney General, 1932-1934, page 104.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 19, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

1. Board of Revenue not authorized to buy stamps for the Board of Jury Supervisors under General Act 1931, page 301.

2. Board of Revenue not authorized to pay telephone expenses of humane officer under General Acts 1923, page 220, and amended by General Acts 1936, page 24.

3. Board of Revenue of Montgomery County may pay for stamps for Jury Board and for telephone expenses of humane officer out of Contingent Fund created by General Acts 1931, page 550.

4. Board of Revenue of Montgomery County may buy stamps for Jury Supervisors and pay telephone expenses of humane officer under Local Acts 1915, page 193.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of March 10, 1939, in which you request my opinion as follows:

"Please refer to Act of 1931 (General Acts 1931, page 301), Act No. 213 of 1923 (General Acts 1923, page 220), as amended by Act No. 464 of 1931 (General Acts 1931, page 548), Act No. 35 of 1936 (General Acts 1936, page 24) and Act No. 468 of 1931, (General Acts 1931, page 550) and advise me as follows:

"1. Would stamps for the Jury Supervisors be a legal expenditure of County Funds under Act of 1931 (General Acts 1931, page 301) or any other law relative to the authority of a County Governing Body?

"2. If your answer is in the negative, could such stamps be paid for from the 'Contingent Fund' that is created by Act of 1931 (General Acts 1931, page 559)?

"3. Would payment of telephone expense for the Humane office be a legal expenditure of County Funds under Act of 1923, (General Acts of 1923, page 220, as amended), Act of 1936 (General Acts 1936, page 24) or any other law relative to the authority of a County Governing Body?

"4. If your answer is in the negative, could such telephone expense be paid for from the 'Contingent Fund' that is created by Act of 1931 (General Acts 1931, page 550)?"

General Acts 1931, page 381, creating a Board of Jury Supervisors for Montgomery County, provides for the payment of a clerk's salary. However, it is silent as to the payment of any other expenses of any kind what-

ever for the Board. Therefore, it is my opinion that under this act, the county governing body could not pay for stamps used by said Board. The county governing body, however, could pay for the stamps under authority of a local act of the 1915 Legislature, which will be quoted later in the opinion.

General Acts of 1923, at page 220, as amended by General Acts 1936, page 24, creates the office of Humane Officer for Montgomery County and provides for the payment of a salary. However, said act fails to provide for any expenses of the humane officer other than the upkeep of an automobile. Therefore, the county governing body would not be authorized to pay for telephone expenses under authority of these acts. The county governing body, however, would be authorized under a local act of the 1915 Legislature to pay for such expenses.

Answering your second and fourth inquiries, I wish to advise that the county governing body could pay for the stamps and telephone expenses referred to in your request from the Contingent Fund as created by General Acts 1931, page 550. The provisions of this act are so very broad and place at the disposal of the Board of Revenue of Montgomery County the sum of seven thousand dollars per year for any kind of purpose not otherwise provided for by law that in their judgment is worthy and for the best interest of the county.

In the event the Board of Revenue of Montgomery County so desired, they might pay for stamps for the Board of Jury Supervisors and also for the telephone expenses of the humane officer out of the general funds, under the local act of the 1915 Legislature. The act reads as follows:

> "The Board of Revenue of Montgomery County is hereby authorized and empowered to furnish the several officers of said county with equipment and conveniences, including janitor charges and telephone services, as may in the discretion of said Board be necessary and proper for the conduct of public business of said county." Local Acts 1915, page 193.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 19, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Judgments—Under statutes providing for punishment of a misdemeanor by a fine of not less than ..... nor more than ....., and by imprisonment in the county jail or sentence to hard labor for the county for not more than ..... in the discretion of the court, upon a plea of guilty, the court may sentence the defendant to a term not exceeding the limits provided in

the statute at hard labor for the county without imposing a fine, and a judgment carrying such sentence is legal and valid.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 17, 1939, in which you request my opinion as follows:

"Please refer to the following:

"Section 3485, Code of 1923, provides that a person convicted of carrying a concealed weapon must be fined not less than $50.00, nor more than $500.00, and may also be imprisoned in the County Jail, or sentenced to hard labor for the County, for not more than six months.

"The judgment of the Court on the trial of a Defendant for carrying a concealed weapon as reflected by the Minutes is as follows:

" 'State of Alabama

vs.

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" 'Indictment—Carry Concealed Pistol. On this the 10th day of Noverber 1938, comes the State by its Solicitor and the Defendant in open Court in his own proper person and being duly arraigned and hearing the indictment against him read, pleads guilty to carrying a concealed pistol as charged therein. It is therefore considered and adjudged by the Court that the defendant is guilty of the offense of carrying a concealed pistol as charged in the indictment and is sentenced to three months hard labor for the County.'

"and advise me as follows:

"1. Is the judgment of the Court in this instance a proper and legal judgment?

"2. Could the Defendant, in addition to such sentence, also be sentenced to Hard Labor to pay the Costs, and if so, is it mandatory that he be sentenced to Hard Labor, as provided by Section 5291, Code of 1923, (reference 122 Ala. 114 and 122 Ala. 74)?

"3. Could execution legally issue for the costs in such a case, and if so, would the fees of officers and witnesses be a legal claim against the Fine and Forfeiture Fund upon return of execution 'No Property Found'?

"4. If execution cannot legally issue, would the fees of officers and witnesses be payable from any fund of the County?"

On February 2, 1939, you propounded almost the identical inquiry to this office. Your letter of that date read as follows:

"Please refer to the following:

"'The offense committed is a Misdemeanor, punishable by fine, and in addition to such fine, on conviction, the Defendant may also be sentenced to Jail or Hard Labor. The defendant is found guilty and the Court enters the following order. "Adjudged guilty of ..... and sentenced to ..... days Hard Labor for the County"';

"and advise me as follows:

"1. Is the judgment of the Court in this instance a proper and legal judgment?

"2. If your answer to Question No. 1 is in the negative, what is the duty of an Examiner of Accounts, examining such Court, when such a condition prevails?

"3. Could the Defendant, in addition to the above sentence, also be sentenced to Hard Labor to pay the Costs, and if so, is it mandatory that he be sentenced to Hard Labor, as provided by law, for a sufficient number of days to pay the Costs?

"4. Could execution legally issue for the costs in such a case, and if so, would the fees of Officers and Witnesses be a legal claim against the Fine and Forfeiture Fund?

"5. If execution cannot legally issue, would the fees of officers and witnesses be payable from any fund of the County?"

On March 15, 1939, we rendered you an official opinion in answer to that inquiry. In it we advised you that such a judgment was incomplete, in that, it should also contain a judgment for costs; that if it did contain a judgment for costs, the defendant should be sentenced to hard labor to pay said costs unless the same were presently paid or judgment confessed therefor; that execution could not issue for the costs unless there is a judgment for the costs; that there being no judgment upon which execution could issue, the costs could not be collected from the fine and forfeiture fund of the county or its equivalent or paid out of any other fund of the county or by the Convict Department. Authorities were cited in that opinion in support of each of these holdings. They are here reaffirmed.

In that opinion we stated in regard to the question of whether or not the judgment of the Court has a proper and legal judgment as follows:

"Such a judgment is incomplete. It is proper as to the fine and additional hard labor sentence, but also should contain a judgment for costs. (Citing authorities)"

Our reference in the above-quoted excerpt from that opinion to the fine is inapt inasmuch as there was no fine included in the judgment. It is obvious that your request of March 17th was propounded to this office as a result of that inapt reference. Therefore, we shall in this opinion deal with that matter only and will forego a discussion of any of the other questions

involved inasmuch as the same have already been answered by this office in the opinion to you above referred to.

Therefore, the only question that presents itself for determination is the question of whether or not the judgment of the court in this instance is a proper and legal judgment. We reaffirm what we said in the opinion to you about the fact that the judgment is incomplete in that it should have contained a judgment for costs which it did not contain. However, the sentence of the defendant to three months hard labor for the county even though no fine was imposed, is legal and proper.

Section 5286 of the Code of 1923 reads as follows:

"Section 5286. When jury need not impose fine, but leave punishment to court.—When an offense may be punished, in addition to a fine, by imprisonment or hard labor for the county, the jury shall not be required to impose a fine; but, if in their judgment, the defendant should only be punished in some other mode, may, in such case, only find him guilty and leave the imposition of the punishment to the court."

Section 8598 of the Code of 1923 reads in pertinent part:

"Section 8598. Demand for jury in misdemeanor cases; waiver of.—In all misdemeanor cases, in the circuit court, the issue and question of fact shall be tried by the judge of the court without the intervention of a jury except in causes where a trial by jury is demanded in writing by the defendant, * * *."

In the instant case the defendant did not demand a trial by jury but plead guilty instead. Therefore, the judge of the court tried the issue and question of fact and was invested in that case with all the power and authority of both the jury and the court.

Consequently, it was within the court's discretion as to whether it would, upon adjudging the defendant guilty, punish him by a fine only, by both a fine and a sentence to imprisonment in the county jail or hard labor for the county, or a sentence to imprisonment in the county jail or hard labor for the county only. The court in its discretion punished the defendant by a sentence to hard labor for the county only. This it had the power and authority to do and its judgment sentencing him to hard labor for the county for three months (three months being less than the maximum time for which the defendant could have been sentenced to hard labor for this offense) is legal and proper.

In such a case the assessment of a fine is not a prerequisite to the validity of a judgment sentencing the defendant to a term at imprisonment in the county jail or hard labor for the county. **Harkey v. State,** 13 Ala. App. 203; **Deck v. State,** 23 Ala. App. 304.

In further support of the holdings of the opinion rendered to you under date of March 15, 1939, which we have here reaffirmed, we refer you to an opinion of this office to Hon. H. W. McKenzie, Treasurer, Marion County, Hamilton, Alabama, rendered under date of March 15, 1939, a copy of which is herewith enclosed for your information, and a copy of an opinion of this office to Hon. F. F. Lyon, Treasurer, Shelby County, Columbiana, Alabama,

under date of March 31, 1939, a copy of which is also enclosed for your information.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 19, 1939.

Hon. E. S. Tunstall,
Tax Assessor,
Baldwin County,
Bay Minette, Alabama.

Taxation—Municipal Corporations—

Act No. 57, H. 183, approved February 27, 1939, amending Section 201 of the Revenue Act of 1935, places mandatory duty on proper county officials to assess and collect municipal taxes of a city or town upon proper ordinance of said municipality.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 24, 1939, in which you request my opinion as follows:

"I have an incorporated town between three and five hundred population which has filed with me a copy of an ordinance which I am herewith enclosing for your consideration. After you have read same, please return for my files.

"Under House Bill 183, amendment of Section 201 of 1935 Act, and approved February 27, 1939, please advise me if under this Act I will be required to assess and put on the Collectors Abstract the town taxes for Summerdale.

"Thanking you for your prompt attention and your early reply, in order that if I have this to do I can have same noted on my Abstract and assessment blanks."

I am of the opinion that your inquiry should be answered in the affirmative.

The copy of the ordinance which you enclosed provided for the assessing and collecting of the taxes due the town of Summerdale, Alabama, by the proper county officials. Said ordinance is dated November 18, 1938.

Under the provisions of Section 201 of the Revenue Act of 1935, it was mandatory upon the proper county officials to assess and collect municipal taxes of a town or city upon proper ordinance of said municipality. **Quarterly Report of Attorney General, Vol. VI, page 26;** see also **Bregden v. City of Opp,** 181 So. 753. The fact that the ordinance was not passed until November 18, 1938, did not relieve the county officials of this duty in regard to taxes payable in 1939. **Quarterly Report of Attorney General, Vol. XII, page 176.**

The question now presents itself as to whether or not Act No. 57, H. 183, approved February 27, 1939, which amends Section 201 of the Revenue Acts of 1935, affects the above rulings. In my opinion, this question should be answered in the negative.

Act No. 57, supra, provides as follows:

"Section 1. That said Section 201, Article VI, of an Act of the Legislature of Alabama entitled, 'An Act to provide for the General Revenue of the State of Alabama,' approved July 10, 1935, be and the same is hereby amended so as to read as follows: Section 201. Any municipal corporation in this State, may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided in this Chapter, and all the machinery herein provided for the assessment, equalization and collection of State and county taxes, the enforcement of such collections, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes and the redemption from such sales, and the assessor and collector shall receive such compensation as may be fixed by the governing body of such municipality, not to exceed one-half of one per cent. for assessing and one-half of one percent for collection, **and if any municipal corporation has heretofore availed itself of the provisions of this section or shall hereafter do so by the adoption of an ordinance as provided for herein, there shall also be applicable to the assessment and collection of its taxes, the sale of property for the collection thereof, and the redemption from such sales, all such other machinery, procedure and provisions of law as are now applicable with respect to the assessment, levy and collection of municipal taxes of cities having a population of not less than 6500 nor more than 15,000 according to the last or any subsequent Federal Census. And such machinery, procedure and provisions shall apply to all uncollected taxes whether heretofore or hereafter assessed, provided the municipal corporation has heretofore adopted such ordinance."**

The amendment merely added the emphasized portion of the above to Section 201 of the Revenue Act of 1935. The part not emphasized is the same as Section 201. The emphasized part merely added to the machinery for the assessment, equalization and collection of municipal taxes under Section 201 of the Revenue Acts of 1935 such other machinery, procedure and provisions of law as are now applicable with respect to the assessment, levy and collection of municipal taxes of cities having a population of not less than 6500 nor more than 15,000, according to the last or any subsequent Federal Census. This had reference to Acts 1931, page 337. (See Quarterly Report of Attorney General, Vol. VII, page 256, which held Acts 1931, page 337, was not repealed by Section 201 of Revenue Acts of 1935). This additional machinery did not,

in my judgment, in any wise affect the former mandatory duty of the proper county official to collect municipal taxes upon proper ordinance passed by such municipality under Section 201 of the Revenue Acts of 1935. This mandatory duty of Section 201 was reenacted in the 1939 amendment.

I am herewith returning the ordinance in question, as requested.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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April 19, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Commissioners' Court of a county may furnish telephone service where solicitor maintains an office outside of the courthouse, regardless of whether or not said office rent is paid by the county, provided office is maintained outside the courthouse because of crowded conditions in the courthouse.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of April 7, 1939, which is as follows:

"I am requesting that you furnish me an opinion on the following question:

"Is the Commissioners Court of Elmore County authorized to provide a telephone and pay for the services of same for the office of County or Deputy Solicitor of said county, where such Solicitor has his office in a building at the County Seat, but not in the Courthouse?"

In Section 6755 of the Code of Alabama, subsection 16, neither circuit nor county solicitors are allowed telephones. By Act No. 187, Acts 1933, page 201, and Opinions of Attorney General, Quarterly Report, Vol. XI, page 64, interpreting the same, the deputy solicitor may be provided with telephone service if his office is in the courthouse of the county. In opinions of Attorney General, Quarterly Report, Vol. XII, page 130, the 1933 act was interpreted to allow the county to furnish telephone service to the circuit solicitor where the solicitor maintained an office outside the courthouse because of crowded conditions therein, regardless of whether or not said office rent was paid by the county. It appears to me that the circuit solicitor

and county or deputy solicitor are in the same category as far as being furnished telephone service by the county is concerned. Therefore, the County Commissioners' Court may provide a telephone and pay for services of the same for the office of the county or deputy solicitor of said county where such solicitor has an office in a building in the county seat but not in the courthouse, regardless of whether or not said office rent is paid by the county, provided the office is maintained outside the courthouse because of the crowded conditions of the courthouse.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 19, 1939.

Hon. O. S. Nichols,
Tax Assessor, Perry County,
Marion, Alabama.

Tax Assessors—

Fee of fifty cents provided by Section 41 of the 1935 Revenue Act for Tax Assessor making demand upon taxpayer, who has failed to make return to him, for a list of his taxable property is chargeable and collectible, even though taxpayer, after he makes a return for a list of all taxable property and claims his exemptions, has no property on which tax must be paid.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 25, 1939, in which you request my opinion as follows:

"I would appreciate you rendering your opinion at the very earliest date on the following:

"Under the exemption law for personal property, you recall that every taxpayer must make his or her tax return with the Tax Assessor within the time prescribed by law, in order to claim the exemption allowed by law.

"Suppose we say that a taxpayer makes his return between October 1st and before January 1st then he is not subject to a Tax Assessor's fee, but say that this taxpayer makes his assessment after the first of January and he has some item of property that is taxable after the Assessor has credited and allowed him with the items allowed exempt, then of course the Tax Assessor carries this taxpayer as an active tax-

payer in the tax book in the beat in which the taxpayer resides, and in compiling the Tax Collector's abstract for collection of the tax we also carry him in alphabetical order in the abstract, and of course he is subject to the Assessor's fee by having made his assessment after January 1st.

"Now the point is, suppose this same taxpayer has made his return after January 1st as above but after listing all the property that he has for taxation he does not have anything taxable after the Assessor has allowed him all personal property exemptions that he is entitled to, therefore, his sheet is marked exempt for the year in which he is making the return, but carried in alphabetical order in the beat in which he lives, but in compiling and making up the abstract for the Tax Collector, we omit writing him up in the abstract for the Tax Collector, because he is not an active taxpayer for the current year. Therefore, we do not charge him with the Assessor's fee but it seems that he would be subject to the fee the same as the fellow that was late and had to pay the fee because he had some taxable property above the exemption.

"What is your idea and opinion in regard to the Tax Assessor handling such cases, should we carry this taxpayer's name in line in the abstract made for the collector and show that he is exempt for taxes but owes a 50c Assessor's fee for not having made his assessment during the time prescribed by law. Some of the Auditors or Examiners say we must post him in line in the Collector's abstract the same as if he had taxable property and that the Collector must make his receipt in line in the Tax Collector's receipt book in the beat that he belongs in and enter the fee in the space on the receipt for same and collect it the same as if he had taxes due.

"The Examiners contend that we must write him up in the abstract the same as if he had taxable property to pay on, and show the fee as being due so that the Tax Collector can collect same.

"The Examiners also contend the reason for the collection of the fee alone, if there is no taxable property to pay on, is to remind the taxpayer that he must make his or her return within the ninety day period allowed by law for such to be done and if you do not cause the fee to be collected, that it will cause him to drift into the habit of being late every year and get later each year.

"Please make ruling at an early date that we may know what to do in writing up the 1939 abstract, which we will begin in a very short time."

The question about which you desire information may be briefly stated as follows:

When a taxpayer has failed to make a return to the Tax Assessor for a list of his taxable property by December 31st and the Assessor makes demand upon him to make such return, and the taxpayer thereupon makes the same, and after claiming his exemptions has no property on which tax must be paid, should the fee of fifty cents provided by Section 41 of the 1935 Revenue Act for the Tax Assessor making this demand be charged and collected from such taxpayer?

I am of the opinion that your inquiry must be answered in the affirmative.

Section 33 of the 1935 Revenue Act provides, among other things:

"Provided that all property claimed exempt from taxation under the provisions of this act shall be listed with the Tax Assessor by the taxpayer and entered on his return showing the items of property sought to be exempted and provided further than no property omitted from said return shall be exempted."

In an opinion of this office to Hon. V. A. Spencer, Tax Assessor, Pickens County, Carrollton, Alabama, under date of December 4, 1935 (Quarterly Report of Attorney General, Vol. I, p. 303), after quoting a portion of Section 31 of the 1935 Revenue Act dealing with the duty of every person to make a return to the Tax Assessor for a list of his property, and the above quoted provision of Section 33, we held that the provisions of these two sections required that an assessment or return must be made up and filed, even though the only property assessed was exempt from taxation.

In an opinion to Hon. Roy Johnson, Tax Assessor, Jefferson County, Birmingham, Alabama, under date of September 27, 1937 (Quarterly Report of Attorney General, Vol. VIII, p. 316) we held that the failure of a property owner to return his property in the manner and within the time required by law and to claim his exemptions, operated as a forfeiture of those exemptions and that in such a case, since the property was not exempt from taxes, it would not be exempt from the penalties imposed for failure to make a return.

Section 41 of the 1935 Revenue Act provides as follows:

"Section 41. After the thirty-first day of December in each year, the Assessor shall in person or by deputy, make a demand upon all taxpayers who have failed to make return to him for a list of their taxable property, and such demand may be made by written notice left with the taxpayer at his residence or place of business, or sent postpaid by registered mail, with return receipt demanded, to the taxpayer's last known place of residence and it shall be the duty of such taxpayer to return such list to the Assessor on or before the third Monday in January following. For making this demand the Tax Assessor shall be entitled to a fee of fifty cents to be paid by the taxpayer, which shall be added to the tax receipt and collected with the tax."

In opinions of this office to Hon. M. K. Marshall, Tax Assessor, Randolph County, under date of March 7, 1936 (Quarterly Report of Attorney General, Vol. II, p. 280) and to Hon. Roy Johnson, Tax Assessor, Jefferson County, Birmingham, Alabama, under date of June 14, 1938 (Quarterly Report of Attorney General, Vol. XI, p. 72), we held that the fifty cent fee provided by Section 41, supra, for the Tax Assessor making the demand upon the taxpayer for a return to him of his property for listing should be charged.

This fifty cent fee is compensation for a service rendered by the Tax Assessor to the taxpayer, and in the instant case the taxpayer has received the benefit of this service. The premises considered, it is my opinion that

this fee is chargeable and collectible from the taxpayer, even though, after he returns his property to the Tax Assessor for listing in response to the demand made upon him by the Tax Assessor and claims his exemptions, he has no property on which tax must be paid.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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April 19, 1939.

Hon. D. Trotter Jones, Chairman,
Alabama Athletic Commission,
Montgomery, Alabama.

Alabama Athletic Association—Amateur contests sponsored by Y. M. C. A.—

Amateur athletic events conducted by Y. M. C. A. as a part of its physical educational program may be exempted from the license and taxation features of the Alabama Athletic Commission Act.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of March 27, 1939, in which you request my opinion as follows:

"I am enclosing herewith a letter that is self-explanatory and I will appreciate your giving me an opinion as to whether or not the Alabama Athletic Commission will be in its legal right to exempt the Y. M. C. A. organizations from the various taxes etc., collected from other organizations who sponsor wrestling and boxing exhibitions. They are claiming exemption under the 1935 amendment to the Act creating the Commission.

"I might tell you that the Commission met yesterday and it was their desire, if they could legally do so, to exempt the Y. M. C. A.'s if exhibitions are put on as described in this letter from Mr. Johnston."

In my opinion, the Alabama Athletic Commission legally may exempt Y. M. C. A. organizations from the taxing provisions of the Alabama Athletic Commission Act. Section 3 of said Act, as amended (General Acts, 1935, p. 647) specifically exempts educational institutions from the license, permit, fee and tax provisions thereof. In part, it provides:

"* * * provided, however, that nothing in this Act shall be construed as permitting, authorizing, or enjoining the Commission to collect any

license, permit, fee, or tax for any amateur boxing, sparring, or wrestling matches or exhibitions held under the auspices of educational institutions when the proceeds of affairs of this nature are to be used to foster, aid, or abet programs of education in the State of Alabama. But no exemptions from license, permit, fee, tax, or charges will be granted to any person, group of persons, or organization when the proceeds or any part thereof of such amateur boxing, sparring, or wrestling matches or exhibitions are for personal or private gain. Reports of all such matches shall be made to the Boxing Commission within ten days thereafter, and upon such form and with such information as may be required by the Commission."

I understand that the charter of the Y. M. C. A. describes it as a "non profit social, educational and religious organization;" and that physical education is a recognized function of that organization.

In my opinion, based on the facts set out in the letter enclosed with your request, the Y. M. C. A. is such an "educational institution" as is contemplated by Section 3(d), quoted supra; and if the proceeds of any of its athletic events are not for personal or private gain, the Board may exempt it from the provisions for license, permit, fee and tax. Cf. Biennial Report of Attorney General, 1936-38, page 230. The distinguishing feature of Biennial Report of Attorney General, 1930-32, page 359, which limits the organizations to which permits may be issued, is that it construes provisions of a former law. Quarterly Report of Attorney General, Vol. VII, page 76.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 19, 1939.

Hon. R. L. Farrow,
Rabies Inspector,
Marshall County,
Albertville, Alabama.

Rabies—Dog Control Act—

1. Any competent veterinarian may vaccinate dogs against rabies.

2. Dog owners cannot be forced to deliver their dogs to the Rabies Inspector at any named place or time for vaccination so long as the dogs are vaccinated prior to September 1st of each year.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of April 6, 1939, in which you request my opinion as follows:

"Would thank you for your opinion on the following questions as quick as possible.

"Under the new law is any Veterinarian eligible to vaccinate dogs against Rabies?

"Can a person who has a permit from the State of Alabama to practice Veterinary vaccinate dogs?

"Is the Rabies Inspector compelled to make calls at private homes to vaccinate dogs if called upon to do so?

"Is there anything about the Rabies control act to force people to deliver their dogs to the Rabies Inspector at any named place or time for vaccination."

Act No. 184, General Acts 1939, is an amendment to the so-called Dog Control Act of 1936-37 found on page 230 of General Acts of 1936-37.

Under Section 3 of said act is found the following provision:

"Prior to September 1 of each year every owner of a dog not confined at all times to an enclosed area or on a leash or muzzle shall cause such dog to be inoculated against rabies by the rabies inspector **or a competent veterinarian,** etc."

The above section, therefore, clearly indicates, in my opinion, that under the recent act approved March 17, 1939, any competent veterinarian is eligible to vaccinate dogs for rabies.

Your second request is to be determined on the definition of the word "competent". For the purpose of this interpretation, it is my opinion that this means "legally qualified" (12 C. J. 233). Therefore, it seems that any legally qualified veterinarian is permitted to inoculate dogs for rabies under this act. However, it is necessary that certificates of inoculation conforming to the requirements of Section 3 of the Act be given the Rabies Inspector in such cases. The permit from the State of Alabama certifying that a person is permitted to practice veterinary is, of course, sufficient. Therefore, it is my opinion that your second inquiry should be answered in the affirmative. See opinions of the Attorney General, Quarterly Report Vol. VIII, page 238, Vol. IX, page 74, Vol. VII, page 152. These opinions were written before the passage of the new amendment, but the new amendment does not change this particular phase of the Dog Control Act under which these opinions were rendered. Hence, they are still in force.

The act says, "Every owner of a dog not confined at all times to an enclosed area or on a leash or muzzle shall cause such dog to be inoculated against rabies by the rabies inspector or a competent veterinarian." The duty of having the dog (coming within these provisions) inoculated is rested squarely upon the owner. If the owner does not comply with these provisions he is subject to the penalty as set out in Section 7 of the Act.

It appears to me to be a matter purely discretionary with the Rabies Inspector as to whether or not he will call at the house of the dog owner

for inoculation purposes. There is certainly no provision of law requiring him to do so.

There is, in my judgment, no provision of the "Dog Control Act" requiring the owner to present his dog at any specific place named by the Rabies Inspector at any specific time. The requirement under the new act is that the dog shall be inoculated "Prior to September 1 of each year * * *." How he does this or when, so long as it is done by September 1st and by the Rabies Inspector or a competent veterinarian is not the concern of this act. In other words, you cannot force the dog owner to have his dog inoculated by the Rabies Inspector. Therefore, it necessarily follows that he cannot be forced to have his dog at any particular place at any particular time for this purpose. The intent of the act is carried out when the dog has been inoculated prior to September 1st by a duly qualified person.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 21, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Schools—Refunding Warrants—

Warrants may be issued under Act No. 157, S. B. 149, approved March 17, 1939, subject to limitation as set forth in advisory opinion of Supreme Court rendered March 2, 1939. Rate of interest not to exceed 5% per annum, denominations and maturity date or dates to be fixed by Warrant Commission. Warrants to be issued to State Treasurer as custodian of public school fund and paid in usual manner by issuance of a Comptroller's Warrant.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 21, 1939, in which you request my opinion as follows:

"Please refer to Senate Bill No. 149, by Mr. Hildreth, General Act of 1939, Regular Session, and advise me in answer to the following:

"1. Is the above Act No. 149 Constitutional?

"2. Should the warrants authorized therein bear interest at the rate of 5%?

"3. In July, 1935, the 5% Income Tax Warrants authorized by Senate Bill No. 6, by Mr. McDaniel, General Acts of 1933, were refunded at a lower rate of interest varying from 1.85% to 4%. Would this affect the rate of interest to be allowed on the warrants authorized in Senate Bill No. 149?

"4. Should the warrants be dated July 1st, 1933, or should they be dated as of date of issuance?

"5. To whom should the warrants be issued?

"6. In what denominations should the warrants be issued?

"7. What should be their maturity date or dates?

"8. In reference to Section 2 of the Act, would not the Comptroller be required to issue State warrants to pay the interest and principal of all warrants issued? (This allowing for proper provision having been made in accordance with the Act for the payment of the next two maturing installments of interest, and the next maturing installment or principal of refunding bonds as now provided in the 1935 Act, and after provision has been made for other lawful charges).

"9. Is the Comptroller protected on his official bond in every way should the $626,358.39 of warrants, with interest, be issued under the authority of Senate Bill No. 149?

"10. Is the State Treasurer protected on his official bond in every way should the $626,358.39 of warrants with interest, be issued under the authority of Senate Bill No. 149?"

In answer to your first inquiry, I wish to refer you to An Opinion of the Justices dated March 2, 1939 (Ms). Said opinion is an opinion of a majority of the Supreme Court in answer to questions propounded to the Court by the Senate in regard to the constitutionality and construction of the then pending Senate Bill 149, which is now Act No. 157, approved March 17, 1939, the one under consideration. Said opinion is as follows:

"We cannot undertake to verify the legislative finding of facts upon which the proposed replacement of school funds is predicated.

"We direct attention to the Income Tax Amendment to the Constitution, known as Amendment XXV, Article XXII, wherein it is provided that 'all income derived from such tax shall be held in trust for the payment of the floating debt of Alabama until all debts due on October 1, 1932 are paid."

"The bill states the sum here involved was a part of the floating indebtedness on that date (October 1, 1932), and for which warrants were outstanding at that time. Amendment XXVI, Article XXIII of the Constitution, known as the Warrant Amendment, designates the floating indebtedness for which warrants or other instruments were to be issued, aggregating $16,943,357.12; and the proposed bill discloses that

in fact the indebtedness paid out by a diversion of these school funds (**Turnipseed v. Blan,** 226 Ala. 549; **Hall v. Blan,** 227 Ala. 64) formed a part of the above named sum of $16,943,357.12.

"We are of the opinion that it is within legislative power to recognize and declare a right of equitable subrogation and thus replace the funds so wrongfully diverted by an appropriation from funds made available for their lawful payment, namely, a surplus of the income tax fund; provided such refund in no way impairs the security of the outstanding bonds to the payment of which the income tax fund is pledged."

It follows that your first inquiry should be answered in the affirmative, subject to the limitations set out in said opinion.

Sections 1 and 2 of the Act in question provide as follows:

"Section 1. That the Warrant Commission composed of the Governor, State Comptroller and the Attorney General, created under an Act of the Legislature approved April 17, 1933, be and it is hereby required **to issue to the Treasurer of the State of Alabama as custodian of the public school fund collected under the levies provided by Sections 256 to 260 inclusive of the Constitution of 1901, interest bearing warrants to be dated July 1, 1933, for the sum of $626,358.39 as provided in said Warrant Act,** representing a like amount of warrants which constituted a part of the floating debt of Alabama at the close of business on September 30, 1932, and due on October 1, 1932, and which were included in the outstanding and unpaid warrants drawn on the treasury as provided by law amounting in the aggregate to $16,943,357.12, on which the Governor was authorized to pay interest from July 1st, 1933 by the amendment to the Constitution of Alabama proposed by Senate Bill No. 5 passed by the Senate April 4, 1933 and by the House of Representatives of Alabama on April 14, 1933, and proclaimed ratified by the people of Alabama on August 1, 1933. (Italics supplied).

"Section 2. The Treasurer of the State of Alabama is hereby directed to pay said warrants when issued out of any surplus of proceeds of Income Tax from time to time after provision has been made for the payment of the next two maturing installments of interest, and the next maturing installment on principal of refunding bonds as provided in the Act of the Legislature of 1935 approved February 8, 1935, and after provision has been made for the payment of any other lawful charges against the proceeds of said income tax."

It will be noted that the warrants in question are to be issued as provided in the Warrant Act, which is Act No. 77, S. B. 6, approved April 17, 1933 (General Acts 1933, page 189). Sections 3 and 5 of said Warrant Act provide as follows:

"Section 3. The Governor, the State Comptroller, and the Attorney General of Alabama are hereby constituted a Warrant Commission, with full authority to have executed, issued and to sell and/or exchange the warrants and/or other instruments herein authorized. No member of the Warrant Commission shall receive compensation in any form for any duties rendered by him in and about the issuance, sale, and/or exchange of such warrants, and/or other instruments. The Commission shall meet at

the call of the Governor, who is hereby constituted its chairman and the Commission shall elect a Secretary of the Commission."

"Section 5. The warrants and/or other instruments hereby authorized shall be executed, sold and/or exchanged and delivered on behalf of the State of Alabama from time to time and shall be in such denominations and numbers and series, and shall mature at such times and bear such rate of interest, not exceeding five per cent (5%) per annum payable semi-annually from July 1, 1933, as may be deemed expedient by the Warrant Commission, but such warrants and/or other instruments shall not be sold for less than the par value thereof. Warrants and/or other instruments may be issued in denominations as low as Fifty Dollars ($50.00) and may be exchanged at par to the person who holds a warrant against the State, dated prior to October 1, 1932."

Said sections authorize the Warrant Commission to determine the denominations of the warrants to be issued, the maturity date or dates, the rate of interest not to exceed 5% per annum, etc. These are matters left to the discretion of the Warrant Commission.

Therefore, it follows that your second inquiry should be answered in the negative. The rate of interest should be fixed by the Warrant Commission in its discretion not to exceed 5% per annum.

I am of the opinion that your third inquiry should also be answered in the negative. The fact that the other warrants issued to refund the $16,943,357.12 validated indebtedness bore a specific rate of interest, would not, in my judgment, affect the interest rate of the warrants under consideration.

In answer to your fourth inquiry, I am of the opinion that the warrants should be dated July 1, 1933. Act No. 157, S. B. 149, supra, specifically provides that the warrants in question be dated July 1, 1933.

In answer to your fifth inquiry, it is my opinion that the warrants in question should be issued to the State Treasurer as custodian of the public school fund. Section 1 of Act No. 157, S. B. 149, supra, specifically provides that the warrants be issued to the State Treasurer as custodian of the public school fund.

In answer to your sixth inquiry, it is my opinion that the Warrant Commission should determine the denominations of the warrants under consideration, provided the denominations should not be less than $50.00. **Section 5 of Act No. 77, S. B. 6, approved April 17, 1933, (General Acts 1933, page 189), supra.**

In answer to your seventh inquiry, it is my opinion that the Warrant Commission should determine the maturity date or dates of said warrants. **Section 5 of Act No. 77, S. B. 6, approved April 17, 1933, (General Acts of 1933, page 189) supra.** However, in determining the maturity date or dates, Section 2 of Act No. 157, S. B. 149, supra, must be considered together with the condition of the income tax fund.

In answer to your eighth inquiry, I am of the opinion that the payment of the new warrants issued should be handled in the same manner as the

payment of the original warrants except that the State Treasurer would be the payee of the Comptroller's warrants rather than the fiscal agent, as in the case of the original warrants.

I am of the opinion that your ninth and tenth inquiries should be answered in the affirmative subject to the limitation as to the constitutionality of Act No. 157, S. B. 149, supra, as set forth in the advisory opinion of the Supreme Court, above quoted, and subject to a compliance with this opinion. **—Sections 869, 2619 and 10291, Code of 1923.**

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 22, 1939.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Land Agents—

1. Land Agent of Mobile County entitled to percentage, not to exceed ten per cent, stipulated in the contract which he held with the State Land Commissioner on all moneys received from redemptions of property that had been purchased by the state at tax sale, which redemptions were secured through his efforts during his tenure as such Land Agent, regardless of the time when the moneys are actually paid or collected, and whether they are paid or collected before or after the contract which said Land Agent held with the State Land Commissioner has been terminated.

2. Land Agent should furnish Judge of Probate such proof that a particular redemption was secured or brought about through his efforts during his tenure as such Land Agent as will reasonably convince the Judge of Probate of such fact before the Judge of Probate pays him the percentage on the amount of moneys paid on said redemption which the contract which he held with the State Land Commissioner provided that he should receive.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 6, 1939, in which you request my opinion as follows:

"With further reference to the matter contained in your unofficial opinion of February 3rd, we have been unable so far to determine

definitely what we shall do in reference to this matter. Enclosed you will find copy of letter from Honorable John C. Curry, State Land Commissioner, of February 3rd, 1939. Since you rendered your opinion, House Bill No. 21 abolishing land agents has been passed. What effect has this on your previous ruling? We should appreciate an official opinion with reference to the following numbered questions:

"1. With reference to those redemptions which are paid in full after January 18th, the date of Mr. Cochran's dismissal, is Mr. Cochran entitled to his commission on these redemptions?

"2. Assuming that the above question is answered in the affirmative, please advise what kind of proof it would be proper of me to demand of Mr. Cochran to establish the fact that the redemption was brought about as a result of his efforts."

The communication from Hon. John C. Curry, the State Land Commissioner, addressed to all Judges of Probate, a copy of which was enclosed in your letter, is as follows:

"February 3, 1939

"TO ALL JUDGES OF PROBATE:

"This is to inform you that the Governor has this day approved House Bill No. 21, which repeals the law approved September 13, 1935 authorizing the appointment of land agents on a commission basis. You are informed, therefore, that after this date there is no authority of law to allow commissions to any agents on land redemptions made after the approval of the above mentioned Act.

"We are informing all of the agents heretofore appointed by the Land Commissioner who were affected by this Act. The above is for your information and guidance.

Very truly yours,

JOHN C. CURRY,

State Land Commissioner."

In an opinion of this office rendered to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of January 28, 1939, a copy of which was sent to you, which opinion was our official answer to an inquiry received from him and an inquiry received from you, we dealt with certain questions concerning the amount of commissions to which Land Agents who held contracts with the State Land Commissioner were entitled on certain redemptions which they had secured during their tenure as such Land Agents.

In response to a telegraphic inquiry from you under date of January 31, 1939, asking further questions in regard to that opinion, we advised you in an informal letter under date of February 3, 1939, as follows:

"The opinion to which you refer is an opinion addressed to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama.

"We particularly call your attention to the fact that we made the following statement in this opinion:

" 'These matters (the matters set out in the letter from Judge Hill and the letter from you which had been quoted in the opinion) will here be considered together and this opinion will be our official answer to both of them.'

"The only question you asked was whether or not Mr. Cochran, the Land Agent of Mobile County, was entitled to 10% commissions on the second, third and fourth, or remaining, installments on redemptions effected during his term of office.

"We answered that question in the affirmative in the following language:

" 'It would necessarily follow that the land agent of Mobile County is entitled to 10% commission (if this is the percentage called for in his contract with the Land Commissioner) out of the monies paid to the Judge of Probate of Mobile County on the second, third, fourth, or remaining installments on redemptions made on the four year plan which were secured, effected, brought about or caused to be made by him during his term of office, even though these monies are paid after he was removed from office, upon his making satisfactory proof to the Judge of Probate that the original redemption for which these monies are paid to the Judge of Probate was secured, effected, brought about or caused to be made by him.'

"We intended the holdings of our opinion to Judge Hill to be applicable in all respects to the Land Agent of Mobile County as well as to the Land Agent of Montgomery County. We particularly call your attention to the following statement from our opinion to Judge Hill:

" '* * * we now advise you as follows: The land agent of Montgomery County is entitled to be paid 10% (his contract calling for 10%) of the monies paid to you for redemptions which he secured, effected, brought about, or caused to be made during his tenure of office, regardless of when these monies are paid to you, and regardless of whether they are paid to you before or after his tenure of office ceases; and that the same should be paid to him by you upon his presenting proper proof to you that he secured, effected, brought about or caused to be made the redemptions for which the monies are paid to you.'

"That statement is here reaffirmed. Applying that holding to Mobile County, it follows that Mr. Cochran is entitled to be paid 10%, if his contract calls for 10%, of the moneys paid to you for redemptions which he secured, effected, brought about, or caused to be made during his tenure of office, regardless of when these moneys were paid to you and regardless of whether they were paid to you before or after his tenure of office ceased; and that the same should be paid to him upon his presenting proper proof to you that he secured, effected, brought about, or caused to be made the redemptions for which the moneys were paid to you."

On the basis of the authorities cited and quoted from in the opinion to Judge Hill, supra, we now reaffirm the holdings therein announced and the statements made by us in the quoted excerpts from our letter to you under date of February 3, 1939, and advise you that the Land Agent of Mobile County is entitled to the percentage for which his contract with the State Land Commissioner called (not to exceed ten per cent) on all moneys paid to you for redemptions which he secured, effected, brought about or caused to be made during his tenure as Land Agent, regardless of when these moneys were paid to you and regardless of whether they were paid to you before or after his tenure as Land Agent ceased, either in whole or in part; and that the same should be paid to him by you upon his presenting proper proof to you that he secured, effected, brought about or caused to be made during his tenure as Land Agent the redemptions for which the moneys were paid to you.

Before you pay him any amounts, you should require him to furnish you with such proof as reasonably convinces you, as Judge of Probate, that the redemptions for which the moneys were paid to you on which he claims a commission were secured, effected, brought about or caused to be made by him during his tenure as Land Agent. As to what proof will reasonably convince you of this fact is a question which addresses itself to you and upon which this office cannot pass.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 22, 1939.

Hon. J. S. Benson,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Counties—Claims—County governing body has no authority to relieve or compromise claim for overpayment of members of jury board.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 27, 1939, in which you request my opinion as follows:

"On behalf of Mr. J. D. Starkey, L. H. Hughes and W. J. Derrick, jury commissioners of this county for the year 1938, I am asking your opinion if the County Commissioners would have legal authority to relieve them of one hundred dollars each over-payment for 1938. To remind you Judge A. E. Hawkins ordered them to refill the jury box after they had received their $100.00 for services prior to his order."

I am of the opinion that your inquiry should be answered in the negative.

Your inquiry involves a construction of Section 6755 (11) Code of 1923, as amended by Acts 1933, page 201, which is as follows:

> "Section 6755. AUTHORITY OF COURT.—The court has authority * * * 11. To compromise on such terms as they may deem just, all doubtful claims in favor of counties when such claims arise on account of moneys, heretofore paid in good faith, by order of such courts, or in any case where they deem it to the best interest of the county * * *"

In an opinion of this office rendered to the State Comptroller on November 4, 1936, (Quarterly Report of Attorney General, Vol. V, p. 76), this section, as amended, was construed. Said opinion held that the court of county commissioners had no authority to compromise a claim against an officer thereof unless the same be of "doubtful validity."

The overpayment of the members of the jury board in the instant case was evidently made due to an oversight of Acts 1933, page 136, which amended Section 5 of Acts 1931, page 55. The 1933 amendment reduced the maximum compensation allowed members of jury boards. Section 5 of the 1931 Act, as amended by the 1933 Act, provides as follows:

> "Section 5. Each member of the Jury Board shall be paid the sum of Five Dollars ($5.00) per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the county treasury upon the warrant of the probate judge of the county. Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the Board shall not exceed for any year of his term the following amounts, viz: In counties of twenty-five thousand population or less Fifty Dollars ($50.00); in counties exceeding twenty-five thousand and not exceeding fifty thousand population One Hundred Dollars ($100.00); in counties exceeding fifty thousand and not exceeding seventy-five thousand population One Hundred and Fifty Dollars ($150.00); and in counties exceeding seventy-five thousand population Three Hundred Dollars ($300.00); the population of said respective counties to be determined by the last preceding federal census."

For the year 1938 the members of the jury boards should have been paid in accordance with the above. It will be noted that there is no limitation on the number of days of service. However, there is a limitation as to the amount of compensation to be received regardless of the number of days of service. Therefore, in my judgment, the fact that the Circuit Judge ordered the jury box refilled after the members of the jury board had received the maximum compensation allowed under the 1933 amendment is immaterial.

From the above, it appears that the compensation allowed members of a jury board is definitely fixed by law. An overpayment would result in a fixed claim due the county and not one of "doubtful validity." Since it is not one of "doubtful validity," the court of county commissioners would have no authority to compromise or discharge said claim. **Quarterly Report of Attorney General, Vol. V, page 76,** supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 22, 1939.

Hon. John C. Curry,
Commissioner,
Department of Revenue,
Capitol.

License tax—Lien—Enforcement—Execution sale—

1. Under Section 394 of the Revenue Act of 1935, it is the duty of the sheriff, upon execution sale, to make reasonable inquiry to ascertain tax liens on property the subject of the sale, and to apply proceeds of sale to the satisfaction of said tax liens.

2. In view of rule of caveat emptor provided by Section 7842 of the Code of 1923, purchaser at execution sale takes property subject to tax liens, notwithstanding the fact that sheriff conducting said sale announced that the state claimed no lien on said property.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of March 25, 1939, in which you request my opinion as follows:

"Section 394 of the General Revenue Act of 1935 reads as follows:

" 'When any sheriff or other officer shall sell any property under execution or other process, or under any decree, judgment, or order of any court, it shall be his duty to ascertain what taxes are a lien upon such property and upon a sale thereof, to first apply the proceeds of such sale to the payment of such taxes.'

"In the case of W. H. Sims, doing business as the Owl Cafe, in Anniston, Calhoun County, Alabama, under date of August 3, 1938, certain property of such defendant consisting, as we are informed, principally of a stock of goods and fixtures, was sold by the sheriff under execution in the case of E. M. Scheussler and R. F. Scheussler, as Executors et al vs. W. H. Sims. The plaintiffs in execution, we are informed, became the purchasers at the execution sale for $250.00. The plaintiffs' attorney advises that at such sale the sheriff announced that the State did not claim any lien on the property being sold under execution, and the purchasers therefore claim to have relied upon the statement or representations of the sheriff.

"The defendant in execution was at the time liable to the State for sales taxes under the Sales Tax Act, approved February 23, 1937, in the amount of $69.40, which amount is still unpaid.

"1. Under the provisions of the Sales Tax Act such taxes constituted a lien upon the property sold under execution, and the question arises as to whether or not under the provision of Section 394 of the General Revenue Act of 1935 the sheriff should have ascertained the amount of

such taxes and should have paid the same out of the proceeds of such sale; and, whether the failure of the sheriff to do so would create a liability against the sheriff and his sureties on his official bond.

"2. Another question arises as to whether the sheriff's failure to ascertain the amount of the taxes and to pay the same out of the proceeds of the execution sale creates any estoppel against the State for the enforcement of the tax lien against the property or the collection of the tax in any other manner, either against the original taxpayer or the purchaser who is in certain cases made personally liable for the payment of the tax under Section 9 of the above mentioned Sales Tax Act.

"Will you please give us your answer to the above stated question?"

Answering your first inquiry, it is my opinion that a sheriff is required under Section 394 of the Revenue Act of 1935 to make reasonably diligent inquiry to ascertain what taxes are a lien upon property which he is proceeding to sell under execution; and, if inquiry develops that such taxes are due, it is his duty to see that the same are paid from the proceeds.

Further answering, it is my opinion that if a sheriff negligently or wilfully fails or refuses to make inquiry as to the liability of the property to tax liens, and the state or any of its subdivisions are deprived of the collection of such taxes by reason of such negligence or wilfullness, the sheriff would be liable upon his official bond for the amount lost by reason of such negligence or wilfullness. Cf. Biennial Report of the Attorney General, 1934-36, page 242, and authorities there cited.

Your second inquiry must be answered in the negative.

Section 11(b) of the Sales Tax Act (Acts 1936-37, p. 135) provides:

"A tax due and unpaid under this Act shall constitute a debt due the State and may be collected by action in debt upon motion for judgment or other appropriate judicial proceedings, which remedy shall be in addition to all other existing remedies; and it shall constitute a lien upon all the personal property of the taxpayer except negotiable instruments not past due and the same shall be collected together with the penalties provided in Section 7 of this Act."

Section 7842 of the Code of 1923 provides:

"7842. Caveat emptor, fraud, warranty.—The purchaser must look for himself as to the title and soundness of all property sold under judicial process. Actual fraud or misrepresentation by the officer or his agent may bind him personally. No covenant of warranty binds him individually unless made with that intention and for a valuable consideration, and in writing."

So that, the purchaser at the execution sale takes title to the property purchased, subject to all valid liens. If a valid lien existed in favor of the state for sales tax due, at the time of the execution sale, the purchaser took the property subject to the lien; and the fact that the sheriff may have announced at the execution sale that the state did not claim any lien on the property being sold, would not operate to estop the state from the

assertion of its lien as against the property purchased, or to maintain an action against the purchaser for the destruction of said lien, in case the property was not available to satisfy the same; nor to change the rule of caveat emptor provided by Section 7842 of the Code, supra.

Of course, the original taxpayer is liable for the tax until the payment is made from some source.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 22, 1939.

Hon. Frank N. Julian,
Superintendent of Insurance,
Capitol.

Taxation—Insurance—

Where dividend is declared and paid to holder of participating fire and casualty policy and applied on reduction of the renewal premium or paid in cash to the policy-holder, the amount of dividend so applied was not a premium received within the meaning of Schedules 160.4 and 160.7 of Section 348 of the Revenue Act of 1935, which levied a tax on all insurance companies based on the gross premiums received.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 13, 1939, enclosing copy of your letter of September 8, 1938, in which you request my opinion as follows:

"Under date of September 18, 1937, you rendered an opinion to this office holding in substance that where a dividend was declared and paid to the holder of a participating life policy, in keeping with a contract, and such dividend was thereupon applied in reduction of his annual renewal premium, the amount of the dividend so applied was not a 'premium received' within the applicable provisions of the 1935 Revenue Act.

"For my guidance, I shall appreciate it if you will advise me whether or not this opinion would also apply with regard to dividends declared and paid on participating fire and casualty policies and applies in reduction of renewal premiums or paid in cash to the policyholders."

I am of the opinion that your inquiry should be answered in the affirmative.

The opinion of September 18, 1937 (Quarterly Report of Attorney General, Vol. VIII, page 256) to which you refer, held that the term "gross premiums received" within the meaning of Schedules 160.4 and 160.7 of Section 348 of the Revenue Act of 1935 should be construed to apply to that amount of premium actually paid by the policyholder after crediting the amount of the dividend upon the annual renewal premium stated in the policy. Said opinion specifically dealt with participating life insurance contracts, but in my judgment is applicable with equal force to participating fire and casualty policies.

The general rule in respect to the matter of your inquiry is found in 26 R. C. L. 187, wherein the following is stated:

> "Whether an insurance company taxable on premiums is to be assessed the full amount of premiums charged or the amount of premiums left after deducting the dividends credited to the policyholders is a question upon which the courts are not in agreement. Generally, however, where the state authorizes an assessment or a tax on the gross annual premiums collected by the insurance company it is construed to refer to money actually collected and used for insurance purposes and not to include the fixed premiums, where the company returns to the policyholder or credits on his annual premiums the difference between the fixed premium and the actual cost of insurance."

To the same effect see 61 Corpus Juris 311.

The rule stated in another way is set out in an annotation appearing in L. R. A. 1918 (D), page 958, which is as follows:

> "The question whether or not a tax upon insurance premiums will cover the gross premium fixed, or the amount actually collected and used by the company for insurance purposes, not including money returned to the policyholders as the difference between the actual cost of the insurance and the fixed premium, generally styled a dividend, depends very largely upon the language of the statute. Generally, however, where the statute authorizes an assessment or a tax upon the gross annual premiums collected by the insurance company it is construed to refer to money actually collected and used for insurance purposes and not to include the fixed premium, where the company returns to the policyholder or credits upon his annual premiums the difference between the fixed premium and the actual cost of the insurance."

As stated in the opinion to you of September 18th, the Alabama courts have not passed upon the question involved, and the courts of other states are not in harmony in their holdings. However, the preponderance of authority is to the effect that the dividends credited against the policy or returned to the policyholder should not be included in the amount of gross premiums received. That opinion followed the majority view in regard to participating life insurance contracts. The courts make no distinction between participating life insurance policies and participating fire and casualty policies. In my opinion, we should follow the weight of authority in regard to this question, since the Supreme Court of this state has not had an opportunity to express its view.

The correspondence attached to your inquiry makes application to your department to deduct the overpayments of former years from the payments

due the current year. I am aware of no authority which would allow this deduction. Taxes due for one year cannot be satisfied by an overpayment of taxes made the previous years. **Shelton, Tax Collector, vs. Blount County,** 81 So. 562, 202 Ala. 620.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 22, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Costs and Fees—Judgments—

1. Trial court may stay execution on a confession of judgment. Clerk should issue execution immediately after date to which execution was stayed and sheriff make proper and timely return.

2. Trial Court has no authority to release defendant prior to a confession of judgment unless costs are presently paid. However, if such a release is ordered in judgment of court, which has jurisdiction of subject matter, the sheriff should follow mandates of the court.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 16, 1939, in which you request my opinion as follows:

"Please refer to the following:

" 'State of Alabama

vs.

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" 'Appealed from County Court—V. P. L. On this the 21st day of August, 1937, comes the State by its Solicitor and the Defendant in open Court in person and by Attorney, and being duly arraigned and hearing the complaint against him read pleads guilty to violating the prohibition law as charged therein. It is therefore considered and adjudged by the Court that the Defendant is guilty as charged in the complaint, and upon due consideration the Court assesses a fine of $50.00, as punishment for said offense. It is further ordered by the Court that the State of

Alabama, for the use of ..... County, recover judgment against the Defendant for the said sum of $50.00, fine so assessed, together with the costs of this prosecution. Defendant is given until November 22nd, 1937, to pay said fine and costs.'

" 'On this the 17th day of May, 1938, the fine and costs in this case not being presently paid, comes now into open Court the Defendant together with ..... and ..... and confess, judgment in favor of the State for said fine and costs, each agreeing to waive their right of exemptions as to personal property under the Constitution and laws of the State of Alabama. It is therefore considered and adjudged by the Court that execution issue against the said Defendant, ..... and ....., on said undertaking, with said waiver of exemptions endorsed thereon.'

" 'The docket sheet bench notes, from which the above minute entries were written, contain two additional orders as follows:

" 'Stay of execution to November 17th, 1938. 'Given to January 1st, 1939, to pay balance. ....., Judge'. 'Such orders are not entered on the minutes.'

"and advise me as follows:

"1. Can the Judge stay the issue of an execution on a confession of judgment?

"2. When should the Clerk issue execution under the above conditions?

"3. Would the Clerk or Sheriff be liable for any loss sustained if, when execution is issued, same is returned 'No Property Found'?

"4. Is there any authority for a Judge to order a Defendant released prior to confession of Judgment for fine and costs by written or oral order?

"5. If there is no authority for a Judge to make such an order, what is the duty of the Sheriff if such an order is made or given?"

I am of the opinion that your first inquiry should be answered in the affirmative.

Section 5288, Code of 1923, provides as follows:

"5288. Confession of judgment by defendant for fine and costs.—When a fine is assessed, the court may allow the defendant to confess judgment, with good and sufficient sureties, for the fine and costs."

Section 5289, Code of 1923, provides as follows:

"5289. Execution issues as in civil cases.—Execution may issue for the fine and costs, or any portion thereof remaining unpaid, as in civil cases."

It will be noted from Section 5289, supra, that execution may issue as in civil cases. Execution in civil cases is governed by Section 7795, Code of 1923.—**Biennial Report of Attorney General 1934-36,** page 230. Said Section provides as follows:

> "7795. Issue of executions must be signed and tested.—The clerk or register must issue executions on all judgments in favor of the successful parties within ten days after the rendition of judgment, unless otherwise directed by the court or the judge presiding at the trial of the cause. The writ must be signed by the clerk, and tested on the day it is issued."

The clause "Unless otherwise directed by the court or the judge presiding at the trial of the cause" in this section, in my opinion, authorizes the stay of execution upon proper order of the trial judge.

In answer to your second inquiry, I am of the opinion that the clerk should issue execution immediately after the date to which the execution was stayed if said execution is stayed more than ten days after confession of judgment.

I am of the opinion that your third inquiry should be answered in the negative if the execution was issued in accordance with the above and the return properly and timely made. Cf. **Opinion of Attorney General to Clerk of Circuit Court of Etowah County on March 30, 1939.**

I am of the opinion that your fourth inquiry should be answered in the negative. When a defendant is convicted and a fine and costs assessed against him, he can either pay the fine and costs, or the court may allow him to confess judgment, with good and sufficient sureties, for fine and costs. Upon failure to pay the fine and costs or confess judgment therefor, the defendant should either be imprisoned in the county jail, or at the discretion of the court, sentenced to hard labor for the county.—**Sections 5290 and 5291, Code of 1923; Opinion of Attorney General to State Comptroller on March 15, 1939.** The suspended sentence law of 1932 (General Acts 1932, page 54) has been held unconstitutional by the Supreme Court in **Montgomery v. State,** 231 Ala. 1.

In answer to your fifth inquiry, it is my opinion that the only course for the sheriff to follow under the facts set out, is to obey the mandate of the court, as the court had jurisdiction of the subject matter. **57 Corpus Juris, 906; Bender v. Graham,** Minor 269. The facts set out in your inquiry show a written order of the trial judge. Since there is no oral order involved in this particular request, it is not necessary to pass upon this point.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 22, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

State Employees—Traveling Expenses—

Claims for traveling expenses incurred by one traveling in the service of the State of Alabama or any of its institutions or agencies must be itemized, verified by affidavit, with vouchers therefor attached before Comptroller can lawfully issue a warrant for same.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated March 18, 1939, which is as follows:

"Re: House Bill No. 6, page 81, General Acts of 1933—Special Session.

"Please advise me on the following question:

"1. Is the Comptroller properly authorized, under the provisions of the above referred to Act, to accept claims and issue warrants for same where the claimants have submitted their expense accounts and had them duly approved by their respective Department Heads and said claims were for a flat $3.00 per diem, unsupported by any itemized statement of the actual expenses incurred and unsupported by receipts therefor?"

The question propounded by you is whether the Comptroller is properly authorized under the provisions of Act No. 37, H. B. 6, approved March 23, 1933, General and Local Acts 1933, Extra Session, Page 81, to accept claims and issue warrants for same where the claimants have submitted their expense accounts and same are duly approved by their respective department heads and said claims are for a flat $3.00 per diem, unsupported by an itemized statement of the actual expenses incurred and receipts therefor.

Said Act, supra, is as follows:

"Section 1. The maximum amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense of transportation shall be $3.00 per diem.

"Section 3. This Act shall become effective upon its passage.

"Approved March 23, 1933."

At the time of the passage of the above act, it was provided by Section 820, Code of Alabama, 1923, that all officers and employees who travel at the expense of the State, shall, before warrants issue for such expenses, file with the State Auditor an itemized statement of such traveling expenses,

verified by affidavit, with vouchers therefor attached when any item amounted to fifty cents or more. Said Section further provides that where the law provides a specific allowance for traveling expenses, only so much thereof shall be paid by the State as is actually expended, and such persons shall file their statements of such traveling expenses, verified by affidavit, with vouchers attached therefor before the State Auditor can lawfully issue a warrant for the same. Section 820, Code of Alabama 1923, is as follows:

> "820. Itemized statement of expenses filed with auditor before warrant issued.—All officers and employees who travel at the expense of the state, shall, before warrants issue for such expenses, file with the state auditor an itemized statement of such expenses, verified by affidavit, with vouchers therefor attached, when any item amounts to fifty cents or more, and it shall be unlawful for the auditor to draw his warrant on the state treasurer for such traveling expenses until such itemized statement, verified by affidavit, with vouchers attached, is filed with him. Where the law provides a specific allowance for traveling expenses, only so much thereof shall be paid by the state as is actually expended, and such persons shall file their statements of such expenses as herein provided."

The powers and duties imposed upon the state auditor by Section 820 Code, supra, were transferred to and conferred upon the State Comptroller by an Act known as the Budget and Financial Control Act (1932, Extra Session, p. 36). The office of Comptroller was abolished by H. B. No. 72, approved March 7, 1939, but the duties and powers of the Comptroller as provided under the Budget and Financial Control Act, supra, are transferred to and conferred upon the Department of Finance and under said act creating the Department of Finance are transferred to and conferred upon the Comptroller who has supervision and control of the Division of Control and Accounts in the Department of Finance. Therefore, the duty imposed upon the State Auditor by Section 820, Code of Alabama, 1923, supra, requiring that he be presented with an itemized statement, verified by affidavit, with vouchers attached therefor, before he can lawfully issue a warrant to an officer or employee for expenses incurred in traveling in the service of the state is applicable to the Comptroller unless Section 820, Code, supra, was repealed by Act No. 87, H. B. 6, General and Local Acts 1933, Extra Session, page 81, supra.

Act No. 87, H. B. 6, General and Local Acts 1933, Extra Session, page 81, supra, does not have a repealing clause and does not in express terms repeal Section 820, Code, supra. On the question of repeal by implication, our Supreme Court has often spoken. In the case of **Davis, et als. v. Browder,** 231 Ala. 332, 165 So. 891, Mr. Justice Knight, in delivering the opinion of the court said:

> "We are not unmindful of the fact that repeal by implication is not favored in the law. It is only when two laws are so repugnant to or in conflict with each other that it must be presumed that the Legislature intended that the latter should repeal the former. If there is a reasonable field of operation, by a just construction for both, they will both be given effect. This is said to be preferable to repeal by implication. City of Birmingham v. Southern Express Co., 164 Ala. 529, 51 So. 159; Riggs v. Brewer, 64 Ala. 282; Herr v. Seymour, 76 Ala. 270, Wyman v. Campbell, 6 Port. 219, 31 Am. Dec. 677; State ex rel. Grace v. Smiley, Clerk, 219 Ala. 119, 121 So. 308; State ex rel, Tubbs et al. v. White, 160 Ala. 168, 49 So. 78."

Applying the principles of law laid down by our Supreme Court in the case of **Davis, et als. v. Browder,** supra, to the proposition here presented, we find that Act No. 87, H. B. 6, General and Local Acts 1933, Extra Session, page 81, provides for the maximum amount allowable per diem, a person traveling in the service of the State of Alabama or any of its institutions or agencies. While the Section 820, Code, supra, provides that each claim presented for traveling expenses incurred by a person traveling in the service of the State must be itemized, verified by affidavit, with vouchers therefor attached, before the state auditor or the comptroller, who now exercises the duties of the auditor provided for in said section, can lawfully issue a warrant for same. Said Section 820, Code, supra, applies regardless of whether a specific allowance is provided by law or not. It is my judgment that there is not an irreconcilable conflict between the two statutes and that they are not repugnant or in conflict with each other, but on the contrary there is a field of operation for both. In short, one statute provides for the maximum allowance allowable a person per diem when traveling in the service of the State and the other provides for the procedure to be followed in making claim and collecting the same.

Therefore, it is my opinion that regardless of whether an expense account has been approved by claimant's Department Head, the Comptroller is not authorized to issue a warrant for the same unless the claim is itemized, verified by affidavit, and has vouchers therefor attached.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 24, 1939.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
Montgomery, Alabama.

Indemnities to owners of cattle reacting to test described by Bangs Disease Act and condemned held properly payable to owners of cows, though cows subjected to test required under act within forty-five days of or after calving.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 20, 1939, in which you request my opinion as follows:

"I call your attention to the last sentence in Section 2 of the inclosed Act, known as the Bangs Disease Act, passed by the recent session of the Legislature. This sentence reads as follows: 'Provided, however, that no cow shall be subject to any test required under the terms of

this Act within forty-five (45 days) of or forty-five days after calving.' This language was added to the Act as an amendment on its final passage. I am informed by competent veterinarian's authority that it is impracticable, if not impossible, to determine any definite length of time before calving, and that the language has no definite meaning in connection with the purposes of this Act.

"I desire your opinion as to whether this language would in any way affect the payment of the indemnity provided by this Act for the type of cattle referred to by the proviso in question.

"Since this Act takes effect from and after May 1 next, I will appreciate your opinion at the earliest possible moment. This is desirable also because the Federal Department of Agriculture, which is jointly responsible for indemnities, desires to know the effect, if any, of this language on the provisions of the Act."

In my opinion, the proviso concerning which you inquire would not in any way affect the payment of the indemnity provided for by the Bangs Disease Act (Act No. 46, S. 61, approved March 17, 1939).

In construing statutes, one must, if possible, ascertain the intention of the lawmakers and the—

**"meaning of the Legislature may be extended beyond the precise words used in the law** for the reason or motive upon which the Legislature proceeded from the end in view or the purpose which was designed. * * * A thing within the intention of the makers of the statute is as much within the statute as if it were within the letter. * * * The intention of the lawmaker constitutes the law. A thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter. Cocciola et al v. Wood-Dickerson Supply Co., 136 Ala. 536, 33 South. 857; Atkins v. Disintegrating Co., 18 Wall (U. S.) 272, 21 L. Ed. 841; United States v. Freeman, 3 How. (U. S.) 565, 11 L. Ed. 724; State v. Dodd, infra, 81 South. 356." (Emphasis supplies).

It is a further rule of statutory construction that statutes should receive a sensible construction such as will effect the legislative intention and avoid absurd or impossible conclusions. **Flynn v. Commissioner of Internal Revenue,** 77 Fed. (2) 188; **Abramson v. Hard,** 229 Ala. 2, 159 So. 590; **Shepherd v. Clements,** 224 Ala. 1, 141 So. 255.

The proviso that a cow shall not be subjected to any test required under the terms of the act within forty-five days of or forty-five days after calving is merely a regulatory police measure to protect the health of the cattle in question and to insure to the owner that his stock will not be subjected to the tests at a time when, infected or not, such tests are likely to prove injurious or fatal. The specification of "forty-five days" in the proviso was the legislative manner of insuring this protection.

It appears from your inquiry, however, that competent veterinary authority states that it is impracticable, if not impossible, to determine any definite length of time before calving. In view of this fact, if such it be, and in view of the obvious intention of the Legislature in inserting the pro-

viso and of the foregoing rules of statutory construction, it is my opinion that the indemnity provided for under the act may be paid to the owner of the cattle condemned and slaughtered, even though the test might have been given within forty-five days of, or after, calving, the proviso, in my opinion, being no limitation upon the payment of such indemnities.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 25, 1939.

Hon. Forrest Castleberry, Member,
House of Representatives,
Repton, Alabama.

Rewards—Offer of reward for the apprehension, arrest and conviction of a fugitive from justice charged with the offense of murder in the first degree, unless sooner revoked, holds good until the apprehension, arrest and conviction of the fugitive for whose apprehension, arrest and conviction the reward was offered.

(a) There is no statute of limitations on such a reward.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 12, 1939, in which you request my opinion as follows:

"In 1927, E. W. (Nick) Farrish, a Conecuh County farmer, was killed by Oscar Burgess, negro, who made his get-a-way. Governor Graves offered at the time a reward of $200 on behalf of the state for his apprehension (arrest and conviction).

"Burgess was apprehended and arrested on February 17, 1939. May this reward still be paid by the governor? If not, may the reward be re-offered in any way in order that the citizens who were instrumental in the negro's apprehension be paid for their efforts?

"The negro was indicted by the grand jury in 1927 and is scheduled to face trial in May term of Circuit Court this year (1939). Indictment was for murder in the first degree."

Section 4161 of the Code of Alabama, 1923, reads as follows:

"Section 4161. Reward for arrest of capital offenders.—When any crime punishable by death has been committed, the governor, upon appli-

cation of the solicitor in the county in which it shall have been committed, may offer publicly a reward not exceeding one thousand dollars to the person who shall give information leading to the arrest and conviction of the guilty person; which reward shall be paid to the informer by the state, by order of the court before which such conviction is had."

This section was new to the Code of 1923.

An examination of the papers attached to your request for opinion shows that on May 18, 1927, Hon. L. S. Biggs, the then Solicitor of the Twenty-first Judicial Circuit (Conecuh being one of the counties in said circuit) made application to the then Governor of the State of Alabama, Hon. Bibb Graves, for the offer of a reward for the apprehension, arrest and conviction of the said Oscar Burgess, and that the then Governor by a proclamation issued under date of May 25, 1927, offered a reward of $200.00 for the arrest and conviction of the said party. The body of the proclamation reads as follows:

"WHEREAS, authentic information has reached this department that Oscar Burgess stands charged with the murder of Nick Farrish, Monroe County; and

"WHEREAS, it appears that the said Oscar Burgess is now a fugitive from justice.

"NOW THEREFORE, I, Bibb Graves, by virtue of the power and authority in me vested as Governor of the State of Alabama, do hereby offer a reward of Two Hundred ($200.00) Dollars for the arrest and conviction of the said Oscar Burgess, provided he has not been arrested at the time of the issuance of this proclamation."

While it does not so appear in the proclamation, the papers in the file (which are herewith returned to you) indicate that this reward was issued under the provisions of Section 4161, supra.

In an opinion of this office under date of May 16, 1921, (Biennial Report of Attorney General, 1920-22, p. 235) construing the provisions of Section 6939 of the Code of 1907 (now Section 4162 of the Code of 1923), and before the provisions of Section 4161, supra, became a part of our statutory law, held that a reward offered pursuant to the provisions of said Section 6939 (4162) lapsed after the expiration of five years from the date of offering the reward, but that a new reward could be offered in the discretion of the Governor.

In that opinion, the general rule on the subject of whether or not an offer of reward lapsed after the expiration of any particular period of time was stated as follows:

"In the absence of statute to the contrary, a reward for a murderer might be claimed and received after the lapse of a number of years, as the statute of limitations does not bar prosecution for a capital crime and the murderer could be tried if arrested, regardless of the time intervening between the crime and the arrest. Code Section 7344, 34 Cyc. 1742."

The general rule on this subject is stated in 54 C. J. 782, Section 17 as follows:

> "Generally, it is held that an offer of reward not limited in its duration by its own terms is not to be understood as intended to be perpetual but as in the case of other contracts it must be considered as being withdrawn after a reasonable time from its date. What period constitutes a reasonable time necessarily depends largely upon the circumstances under which the offer was made. But it has been held that the offer of reward for discovery and information of offenders of a past offense is not barred by lapse of time but continues until the statute of limitations shall have run against the crime."

Section 4928 of the Code of Alabama, 1923 (Section 7344 of the Code of 1907) provides as follows:

> "Section 4928. Offenses as to which there is no limitation.—There is no limitation of time within which a prosecution must be commenced for any public offense which may be punished capitally, or for murder in the second degree, manslaughter in the first degree, arson, forgery, counterfeiting, or any offense expressly punishable, under the provisions of this Code, as forgery or counterfeiting."

No doubt the provisions of Section 4161, supra, were placed in our statutory law to make it possible for a reward to be offered for the apprehension of a fugitive charged with the commission of a capital offense, the offer to hold until the fugitive was apprehended, arrested and convicted instead of holding for only five years as was previously the case. It will be noted that said section only applies to crimes punishable by death, whereas Section 4162, which is the section carrying the five year statute of limitations, applies to all felonies.

Since there is no limitation of time within which a prosecution must be commenced in this state for any public offense that may be punished capitally, it is my opinion that under the authority of Section 4161, supra, a reward may be offered for the arrest and conviction of a fugitive from justice charged with a capital offense to hold until the fugitive is apprehended, arrested and convicted, and that there is no statute of limitations upon such an offer of reward.

Consequently, the reward offered by the then Governor of the State of Alabama in 1927 for the apprehension, arrest and conviction of the said Oscar Burgess is not now barred by any statute of limitations, but is still in effect and may be paid, if the said Burgess, who was apprehended and arrested on February 17, 1939, is convicted, unless this reward has been withdrawn or revoked by the Governor of the State of Alabama at some time since the proclamation offering the same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 25, 1939.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Contractor's License—Licenses—

1. Contractor held required to procure a license in the county in which he has his principal office; the purchase of a license in another county held not to meet the requirements of the Revenue Laws of 1935, Schedule 42, Section 348.

2. License Inspector of county in which the citation is issued to licensee held entitled to citation fees provided for license inspectors, but penalties should be paid to license inspector of county in which licensee has his principal place of business.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 28, 1939, in which you request my opinion as follows:

"Under section 348, schedule 42, pertaining to license levied on contractors among other provisions is the following:

"'Every contractor shall procure from the Probate Judge of the County in which he has his principal office a license to carry on the business of a contractor, provided that if such contractor has no such office in this state, then he shall procure such license from the Probate Judge of the County where the contract is to be performed'.

"Please advise if a contractor having his principal office in this county accepts a contract in Greene County and is cited by the License Inspector of Greene County for license but elects to pay his license in the County of his principal office should the 15% penalty and citation fee provided by law be paid to the License Inspector of Greene County or to the License Inspector of Jefferson County?

"Also advise if a contractor having a principal office in Jefferson County was cited by License Inspector of Greene County and paid contractors license to the Probate Judge of Greene County would he be liable for contractors license in Jefferson County also on account of his principal office being located in Jefferson County?"

In reply to your request, I wish to advise that in my opinion such a contractor should procure his license in the county in which he has his principal office. You will note that the law quoted by you and found in the Revenue Laws of 1935, Section 348, Schedule 42, provides specifically that when a contractor has his principal office in this State he should pro-

cure a license from the Probate Judge of the county in which he has his principal office. This question of jurisdiction for the issuance of the license has heretofore been considered by this office in an opinion addressed to the State Tax Commission, Capitol, under date of February 26, 1932 and reported in Biennial Report of Opinions of the Attorney General for 1930-32, at page 724. While the opinion referred to here deals with the question of jurisdiction for automobile license, in my judgment, the instant case presents a parallel situation and the holding there announced concerning jurisdiction for the issuance of the license is applicable.

The fact that the contractor resided in a different county from that where he maintains his principal office does not affect the right of the license inspector serving the citation to collect the citation fee provided by law. It is my opinion, however, that the **penalty** provided by law to be paid to a license inspector should be paid to the license inspector of the county in which the licensee maintains his principal place of business, subject to the provision that such license inspector is not paid a salary, in which event the penalty would be paid to the county treasury. I wish to refer you to an opinion of the Attorney General found in Quarterly Report of the Attorney General, Vol. VI, page 108, addressed to Hon. Saxon P. Poyner, Judge of Probate, Dothan, Alabama, which refers to a previous opinion of this office under date of November 22, 1935, addressed to Hon. Henry S. Long, President, State Tax Commission, and published in Quarterly Report of Attorney General, Vol. I, page 203. I enclose copies of the two last named opinions for your convenience.

The license inspector of Jefferson County could have cited this delinquent in Jefferson County for failure to purchase a license, but failed to do so. The citation was issued in the county in which the work was being performed by the delinquent contractor and in my judgment the citation fee accrued in Greene County rather than in Jefferson County and should be paid to the license inspector of Greene County, according to your statement of facts.

In answer to your last question, I wish to advise that under the mandates of the law quoted above, a contractor must purchase his license to do business in the county in which he has his principal office, if he, in fact, has a principal office located in Alabama. If such license should be procured in Greene County when the contractor's principal place of business is located in Jefferson County, then, in my opinion, said license would not have been issued in accordance with the law and would be issued contrary to the mandates of the provisions of Section 348, Schedule 42, quoted, supra, by you. I am taking into consideration the provisions of Section 353 of the Revenue Code of 1935, which provides in part as follows:

> "When any license is due, the license inspector shall cause the delinquent to appear before the probate judge of the county and take out the same, but such probate judge shall not have authority to determine the liability of such delinquent for such license, and shall, in each case, issue a license to the applicant upon the payment by him of the amount or amounts prescribed by this act."

Consideration must be given to the clear mandate of Section 348, Schedule 42 of the Revenue Laws of 1935, wherein the law provides that "Every contractor shall procure from the probate judge of the county in which he has his principal office, a license to carry on the business of a contractor * * *." This, you will note, provides for the purchase of a license

by those contractors who have a principal place of business in Alabama and specifically provides that such license must be purchased in the county in which said contractor has his principal office. A rule of statutory construction of long standing and one which has been repeatedly expressed by our courts, is found in the maxim "Expressio unius est exclusio alterius." Where a statute directs the performance of certain things in a particular manner, in my judgment no other manner may be adopted for compliance with the statute other than that expressly provided. I wish to refer you to 59 Corpus Juris page 984, paragraph 582.

Premises considered, it is my opinion that the purchase of a license in Greene County by the contractor is not in accordance with the law when said contractor has his principal place of business in Jefferson County, and that said contractor is liable for a contractor's license in Jefferson County. Of course, the contractor is not subject to two licenses under the provisions of our present revenue statutes and would not be subject to the payment of license in Greene County. He must meet the requirements of the law and purchase his contractor's license in the county in which he has his principal office.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 25, 1939.

Hon. R. H. Williams,
Probate Judge,
Marshall County,
Guntersville, Alabama.

Counties—Claims—

Claims which have been audited and allowed by Boards of Revenue or other Boards of like jurisdiction, in compliance with Section 225, Code of Alabama, 1923, are not barred by the fact that claims were mislaid by the Clerk of the Board and more than one year has expired since their allowance.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated March 24, 1939, which is as follows:

"I will thank you for an opinion on the following at your earliest convenience:

"In 1936 Marshall County refinanced its outstanding obligations, both as to outstanding warrants and accounts payable by the issuance and sale of interest bearing warrants. At the time this was done all warrants and accounts were advertised for. During the time this was going on Marshall County had a Board of Revenue and certain claims held by the Citizens Bank of Guntersville and Geo. M. Nixon were filed for payment in the refinancing plan. However, the Clerk of the Board of Revenue mislaid some of the claims and they were not paid. These claims have now been found among some old files and these parties want them paid. In my judgment, they are valid claims against the county and I would like to pay them if I would be protected in doing so. They have been filed and are on the books. They bear date of filing and allowance in 1935 and 1936.

"Please advise me whether these claims can still be paid or whether they are barred."

In my opinion these claims are not barred and can still be paid.

The auditing and allowance of these claims by the Board of Revenue of Marshall County fixed a prima facie liability against the County. The fact that these claims were mislaid by the Clerk of the Board could not, in my opinion, affect the right of the claimants mentioned in your request, and you, as Probate Judge, can now legally pay these claims. **Stone, County Treasurer, v. State ex rel. Laurendine,** 113 So. 449, 24 Ala. App. 101.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 25, 1939.

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

Fines and Forfeitures—Remission by Governor—

In a case where the Governor remits a portion of a fine imposed in criminal case and, at the time of the remission, the fine has been paid to the clerk who has custody of the same, the clerk may refund to the defendant that portion of the fine which has been remitted by the Governor.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of March 22, 1939, in which you request by opinion as follows:

"Please render to me your opinion on the following matter:

"In a criminal case a defendant pays into the office of the Circuit Clerk total amount of fine and costs due and within thirty (30) days from payment of same and before fine is paid to the county the Governor remits a part of the fine. Would I be in the clear to refund to the defendant the amount remitted by the Governor provided a written showing was filed with me signed by the Governor?"

In my opinion, you are authorized to refund to the defendant that part of a fine imposed upon him which the Governor has remitted. Section 5127 of the Code of 1923, provides:

"Section 5127. Power of governor to pardon; entry and attestation of pardons.—In all cases, except treason and impeachment, the governor has power, after conviction, and not otherwise, to grant reprieves, commutations, paroles, and pardons, and to remit fines and forfeitures and he must cause to be entered, in a book kept for that purpose, his reasons therefor, and must preserve on file all documents on which he acted; and it is the duty of the secretary of state to attest the reprieve, commutation, or pardon, when granted."

In **Chisholm v. State,** 42 Ala. 527, the court said:

"After the rendition of the judgment in the present case, the Governor, under the great seal of the State, there being no restriction upon his power so to do, by any rule or regulation of law, remitted the entire fine, which destroyed the vitality of the judgment, except as to the costs. The court, therefore, on the motion of appellant, should have vacated the judgment, as to the fine, but left it valid and subsisting as to the costs."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 27, 1939.

Hon. J. Lee Smith,
Judge of Probate,
Chilton Conuty,
Clanton, Alabama.

Veterans—Exemption from license taxes—Exemption from poll taxes—

Draftee who was certified by local draft board under the Federal Selective Service Act, but who, on account of physical condition, was not inducted into the armed forces of the United States, is not entitled

to exemption from license taxation nor from poll tax provided by Alabama law.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of March 30, 1939, in which you request my opinion as follows:

"I am herewith enclosing a copy of a discharge from draft of one Jessie Gilbert Coons.

"This person has made application to me for exemption from license as provided by Acts 1935, page 1057, Simon's Code, 1936, page 296.

"The question I desire to know is whether or not this will be construed as an Honorable Discharge from the service as will entitle this applicant to exemption from business license, provided, of course, that applicant otherwise complies with the provisions of said Act.

"Also will you advise me in this same connection whether or not this instrument would justify exemption from poll tax, as being an Honorable Discharge from the Army or Navy?"

Attached to your request is a document which, in effect, discharges the person therein named from the selective service draft, which was put into operation during the World War, for the purpose of drafting citizens into the service of the armed forces of the United States.

General Acts, 1935, page 1057, extends to disabled veterans of the armed forces of the United States a limited exemption from license taxation. Its provisions are extended to "bona fide permanent residents of the State of Alabama who served as officers or enlisted men in the United States Army, Navy or Marine Corps during the World War between April 6, 1916 and November 11, 1918."

The discharge from draft attached to your request purports to show that the local draft board for Pickens County, Alabama, certified the person therein named as liable for military duty, on the 9th day of August, 1918, and that upon his physical examination, at Camp Shelby, Mississippi, on August 12, 1918, he was discharged from the draft.

It is my opinion, based on the limited facts presented, that he was never inducted into the armed forces of the United States. Therefore, he is not entitled to exemption from license taxation.

Section 194½ of the Constitution exempts from payment of poll tax "Persons who honorably served in the military and naval service between January 1, 1917 and November 11, 1918."

Inasmuch as the person mentioned in the discharge from draft was never inducted into the armed forces of the United States, he does not come within

the exemption provision. Biennial Reports of the Attorney General, 1924-26, page 71 and 1930-32, page 104. The apparent conflict in Biennial Report of Attorney General, 1932-34, page 151, may be explained by the difference in the statement of facts. There the exemptioners actually served nearly two months in the Army of the United States.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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April 27, 1939.

Hon. O. L. Andrews,
Clerk of Circuit Court,
Jefferson County,
Birmingham, Alabama.

Witnesses—Fees—

Witnesses, if they attend upon subpoena and secure the proper certificate from the clerk, are entitled to per diem whether they are examined or not.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion of March 3, 1939, which is as follows:

"When companion cases are set for trial on the same day and witnesses are summoned in each of the companion cases, if for any reason the court passes these cases to be reset for trial at a later date and on the last setting the defendants are convicted and are sentenced to the penitentiary, would witness fees claimed and paid for one day of each setting be a correct and lawful charge on the convict department?

"We are familiar with section 3667 of the Code of 1923, which states: State witnesses' fees, which are fixed at seventy five cents before the court of conviction, and five cents per mile for each mile traveled to and from the grand jury and court of conviction, but no witness shall be entitled to fees in more than one case on the same day.

"The convict department has just returned two cost bills, companion cases, which were set first for December 13, 1938. The witnesses were summoned for this setting and claimed per diem in one case. The court, for reasons unknown to us, passed these cases. They were again set, this time for January 17, 1939, by the court. Witnesses claimed for one day at the later setting, in one case only. We make a notation on the cost bill showing the date the witnesses has claimed his per diem for.

"We often have cases to last more than one day, have had them to last a week. The present ruling by the convict department will prevent our charging the convict department in penitentiary cases for more than one day's attendance for any witness no matter how long the case might last in court. We feel that the witness should be entitled to one days attendance no matter how long he has to attend court."

Code Section 3762 of the 1923 Code of Alabama, as amended, provides as follows:

"Section 3762. Fees and compensation of witnesses.—Witnesses in criminal cases are entitled to seventy-five cents per day and five cents for each mile to and from their residence by the route usually traveled, and all necessary ferriages and toll."

It is my opinion that under the facts stated in your letter, the witnesses were legally entitled to be paid for attending court, in response to a subpoena duly issued, for the day on which the case was continued and for the day on which the case was tried. I refer you to the cases of **Hill v. White**, 1 Ala. 576, and **Cohen v. Patts**, 51 Ala. 511; also Biennial Report of Attorney General, 1928-30, page 173.

"Where a witness attends at the term for which he is subpoenaed and the cause is on the docket for trial at such term but is continued or postponed and cannot be tried, the witness is entitled to compensation for such attendance * * *." 70 Corpus Juris 69, Section 66.

Section 3667 of the Code of Alabama, 1923, provides in part that the Convict Department can only pay a witness in one case a day, although he may testify in more than one case. This was correctly stated by your inquiry.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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April 28, 1939.

Hon. R. E. Moore, Superintendent,
Cullman County Schools,
Cullman, Alabama.

County Board of Education—The County Board of Education of Cullman County, Alabama, has power and authority to alter or modify contract for construction of school buildings existing between it and P. S. Duckworth and Company and to compromise bid bond, subject, however, to any contract or regulation which may exist between county board and Public Works Administration.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of April 22, 1939, in which you request my opinion as follows:

"On April 7th, the County Board of Education of Cullman County received bids for the construction of four school buildings in Cullman County. The bids were received in two ways: First, each bidder gave separate bids on each of the four buildings and following that a bid on all four buildings as a unit. The Board of Education reserved the right to accept the four lowest individual bids or the lowest group bid if it proved to be lower than the sum of the four lowest individual bids.

"P. S. Duckworth and Company of Cullman submitted a group bid of $99,000.00 on the four buildings which was lower than any other group bid and lower than the sum of the four lowest individual bids. While the bidding was in progress and when Mr. Duckworth's bid was read, he stated that he had made an error in his group bid, but he did not at that time request permission to withdraw his bid nor did his mention of his error come to the attention of the Board of Education.

"After the bidding was over and after full discussion, the Board of Education awarded the contract to P. S. Duckworth and Company at $99,000.00. Later in the day, Mr. Duckworth appeared before the Board and requested that he be released from his contract or that his bid be rejected. His request was rejected, and the award of the contract was certified to the Regional Office of the Public Works Administration in Atlanta, Georgia.

"The low individual bidders were:

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|---|---|
| "Joppa—P. S. Duckworth & Company | $35,000.00 |
| Cullman County High School—P. S. Duckworth & Company | 10,400.00 |
| Holly Pond—Stricklin Lumber Company | 15,465.00 |
| Crane Hill—W. J. Perry | 45,500.00 |

"The total of these four is $106,365.00. The next low group bid was that of W. J. Perry for $112,125.00.

"P. S. Duckworth and Company now make the following proposal to the Board of Education:

"1. That they forfeit their contract on the four buildings at $99,000.00 and settle with the Board of Education on a bid bond of $4,900.00 for the amount of $1,400.00.

"2. That the Board of Education award them the contract for the Joppa and the Cullman County High School buildings and that they award the Crane Hill building to W. J. Perry and the Holly Pond building to the Stricklin Lumber Company for the amount of $106,365.00, the sum of their individual bids for the four buildings.

"Will you please give the Board of Education your opinion on the following questions:

"1. Can the Board of Education legally accept from P. S. Duckworth and Company a settlement of a bid bond of $4,950.00 for the sum of $1,400.00?

"2. In the event Question No. 1 is answered in the affirmative, can the Board of Education then award P. S. Duckworth and Company the contract for the two buildings for which they were the next lowest bidders?"

From the facts stated in your letter, it is my opinion that when P. S. Duckworth and Company submitted its bid for the construction of the school buildings and this bid was accepted by the County Board of Education of Cullman County, Alabama, that this was sufficient to constitute a binding executory contract. **County Board of Education of Jefferson County v. Cement Products Co.,** 209 Ala. 310, 96 So. 236. This being true, it follows under the authority of the settled law of this state that regardless of the hardships that may be imposed by this contract or the inadequacy of the consideration of the same, this would be insufficient to authorize the cancellation of the contract of P. S. Duckworth and Company. **Capital Security Co. v. Holland,** 6 Ala. App. 197, 60 So. 495; **Stephenson v. Atlas Coal Co.,** 147 Ala. 432, 41 So. 301. As a general rule, however, while a contract is executory, the parties by mutual assent may abandon the transaction, or rescind the contract, or they may modify or alter the terms of the said contract and no consideration other than mutual assent of the parties is necessary. **E. T. Gray & Sons v. Satuloff Bros.,** 213 Ala. 526, 105 So. 666; **Dickey v. Vaughan,** 198 Ala. 283, 73 So. 507; **Elliott v. Harrison,** 146 Ala. 568, 40 So. 1018; **Hembree v. Glover,** 93 Ala. 622, 8 So. 660.

The question then arises whether or not the County Board of Education of Cullman County, Alabama, is authorized and empowered to assent to the modification and alteration of the contract now existing between it and the P. S. Duckworth Company and compromise the bid bond in accordance with the proposition submitted by the latter. On this subject we must consider the legal status and authority of county boards of education. For this purpose attention is directed to the case of **Jefferson County Board of Education v. Union Indemnity Co.,** 218 Ala. 632, 119 So. 837, where Mr. Justice Foster, in delivering the opinion of the court, said:

"A county board of education exercises control and supervision of the public school system of the county, section 88, School Code of Alabama 1924: It 'has general administration and supervision of the public schools, school buildings and educational interests' of the county. Dean v. County Board of Education, 210 Ala. 256, 97 So. 741. 'All property and funds for public school purposes are transferred to and vested in said boards and their successors in office.' The board is also given authority to borrow money and to condemn property for school purposes, and to sue and contract. 'This board' is given 'ample power, with rather full supervision of the public school system of counties, and that the school funds are under the control of said board and placed in the custody of a treasurer selected by the board. * * * This board is in fact a quasi corporation * * * and constitutes * * * an independent agency of the State for the purposes * * * enumerated.' Kimmons v. Jefferson County Board of Education, 204 Ala. 384, 85 So. 774. 'It may sue and contract, all con-

tracts to be made after resolutions have been adopted by the board and spread upon its minutes.' Section 106, School Code of 1924; Greeson Mfg. Co. v. Board of Education, 217 Ala. 565, 117 So. 163. The building program of public schools shall be submitted to and adopted by the county board. Section 123, School Code of 1924."

Attention is called to the fact that the above quoted excerpt from said opinion refers to the School Code of 1924. However, a careful examination of the laws as they now exist in reference to County boards of education reveals that said boards have the same powers, authority, jurisdiction and duties as existed at the time the Supreme Court passed on the legal status of the county boards of education in the case of **Jefferson County Board of Education v. Union Indemnity Co.**, supra.

From the foregoing declaration of the legal status of county boards of education by the Supreme Court in the case of **Jefferson County Board of Education v. Union Indemnity Co.**, supra, it is my opinion that the County Board of Education of Cullman County, Alabama, has the power and authority to alter or modify the contract now existing between it and the P. S. Duckworth and Company in accordance with the proposition submitted by the latter, and to compromise the said bid bond of $4,950.00 for $1,400.00 in consideration for the altering or modifying of said contract. The power and authority of said board to take this action is subject, however, to any contract, or regulation, which may exist between it and the Public Works Administration.

The foregoing conclusions are in no way adversely affected by Act No. 540, approved September 14, 1935 (General Acts, 1935, page 1146) relating to the prequalification of bidders on public improvements. This office has previously held, in construing Section 14 of said Act, that the provisions thereof are not applicable to contracts awarded by County Board of Education. (Quarterly Report of Attorney General, Vol. XI, page 10.)

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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April 28, 1939.

Hon. J. W. Bryant,
Tax Collector,
Cullman County,
Cullman, Alabama.

1. Bankruptcy Court—Under Section 64(a) of the Bankruptcy Act, as amended, the bankruptcy court has a right to consider and decide whether taxes assessed against the real estate of the bankrupt are in excess of the value of the interest of the bankrupt estate therein, and if excessive to reduce the same.

2. Bankruptcy Court—Bankruptcy court has exclusive power to place the value upon the property of the bankrupt estate.

3. Taxes—If the bankruptcy court reassesses the property of the bankrupt estate and reduces the taxes, interest at the rate provided by law could be collected on the amount of the taxes so reduced.

Opinion by Assistant Attorney General Russell.

Dear Sir:

This will acknowledge receipt of your request for official opinion dated March 29, 1939, which is as follows:

"W. C. Scott is Trustee of Griffith & Warren Bankruptcy, who have had taxes in litigation in Cullman County for four or five years. The assessed valuation is approximately $7000.00. Mr. Scott says that David A. Grayson, referee in Bankruptcy, Huntsville, Alabama informs him that he (Mr. Grayson) has authority to fix the tax, or assessed valuation, of this property at 60% of the sale price which is $6000.00 making the tax value $3600.00 instead of the $7000.00 now on the tax records. Mr. Scott asked that I accept that as a proposal, and I declined to do so until I would get a ruling on the matter.

"Please give me an official ruling on the following:

"(1) Does Mr. Grayson as referee in bankruptcy have the authority to fix tax values in the above cause?

"If so,

"(2) What evidence must I have that he has fixed the tax valuation before I allow the taxes paid in accordance with his valuation?

"(3) Does he have exclusive power to fix the valuation, or must it be at 60% of sale price of the property?

"(4) Shall interest be charged on his valuation the same as would have been on the old valuation?

"An early reply will be much appreciated. Mr. Scott says the property is being sold and he would like to hear from me at an early date."

The first question propounded in your inquiry has been the subject of much litigation and the courts are not in accord in their decisions. I assume that the referee in bankruptcy in your particular case bases his power and authority to reassess the taxes under the provisions of Section 64(a) of the Bankruptcy Act (11 U. S. C. A.) Section 104(a) which provides:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, County, district or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest

of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public offices for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

The above section as it appears in its amended form, supra, does not change in any material way Section 64(a) of the Bankruptcy Act as it existed prior to its being amended other than that it definitely and with certainty gives the bankruptcy court the power to determine the amount or legality of a tax. The commentator in the 1938 Collier-Bender Addition of the Bankruptcy Act, in considering the effect of said amendment insofar as it deals with the question of taxes, said:

"The change therein that is noteworthy is the certainty that the Bankruptcy Court has power to determine the amount or legality of a tax."

In construing Sections 64(a) and 64(a) as amended, the Federal Courts are not in accord on the question as to the power of the bankruptcy court to reduce the taxes assessed by the United States, States, Counties, Districts, or municipalities against bankrupt estates. However, the United States Supreme Court, in the case of **New Jersey v. Anderson,** 203 U. S. 483, held that under Section 64(a) of the Bankruptcy Act, the bankruptcy court had a right to consider and decide whether taxes assessed against the real estate of the bankrupt were in excess of the value of the interest of the bankrupt estate therein and if excessive to reduce the same. This decision has been cited and followed in numerous cases. In the case of **In Re Fisher,** 229 Fed. 316, Judge Morton said:

"The power explicitly given to the bankruptcy court to hear and determine any question as to the amount or legality of the tax would seem to imply that it is not bound by the action of the taxing authorities but may decide the question for itself; and the right is not limited by the statute to such questions as the bankrupt might still have raised against the tax at the date of the bankruptcy proceeding."

In the case of **City of Springfield v. Hotel Charles Co.,** 84 Fed. (2) 589, the Circuit Court of Appeals, in speaking to this question, said:

"On the question whether the District Court had power under section 64a to revise the taxes, it is settled that the power of state officials to determine and levy taxes must yield to the constitutional power of the federal government to establish what it regards as just rules for liquidation in bankruptcy. New Jersey v. Anderson, 203 U. S. 483, 27 S. Ct. 137, 51 L. Ed. 284; Van Huffel v. Harkelrode, 284 U. S. 225, 52 S. Ct. 115, 76 L. Ed. 256, 78 A. L. R. 453. See, too, In re E. C. Fisher Corp. (D.C.) 229 F. 316. We do not doubt the power of Congress to authorize courts of bankruptcy to re-examine claims for state taxes made against bankrupt estates and to allow them only for the amount which appears to be justly due, as is provided in section 64a."

It seems the weight of authority is to the effect that the bankruptcy court has power to reassess real estate of the bankrupt and reduce the amount of the taxes claimed where the taxes assessed are in excess of the

value of the bankrupt estate therein. However, there is authority to the contrary. In the case of **In re Schach,** 17 Fed. Supp. 374, the Federal District Court of Illinois held in substance that on the county collector's claim for taxes on a bankrupt's realty, the bankruptcy court was powerless to re-appraise property and reduce the tax claimed if it was found that the valuation of the property was excessive. This case was based on and followed the holding as laid down in the case of **In re Gould Mfg. Co.,** 11 Fed. Supp. 644. The reasoning behind these decisions was that where it appeared that the tax assessor had made an honest effort to ascertain the true value of the property and the land owner had made no attempt to have the valuation placed thereon reduced, as was his right, the creditors of the landowner on his subsequently becoming a bankrupt were bound by what he did or failed to do and the bankrupt court had no right to reassess the property and reduce the taxes.

In the case of **In re Fuoco,** 22 Fed. Supp. 808, District Judge Fake, in considering this same question, reviewed the cases holding on both sides of this question and reached the conclusion that the bankruptcy court under 64(a) of the Bankruptcy Act as amended, had a right to consider and decide whether taxes assessed against the real estate of the bankrupt were in excess of the value of the interest of the bankrupt estate therein and if excessive to reduce the same. The following is an excerpt from said opinion:

> "Upon a study of the briefs filed in the above-entitled cause and a careful reading of the opinion in Re Gould Mfg. Co., D. C., 11 F. Supp. 644, as compared with the opinion in New Jersey v. Anderson, 203 U. S. 483, 27 S. Ct. 137, 51 L. Ed. 284, and City of Springfield v. Hotel Charles Co., 1 Cir. 84 F. 2d 589, I am of the opinion that this court had jurisdiction under section 64a of the Bankruptcy Act, as amended, 11 U.S.C.A. Sec. 104 (a), to consider and decide whether taxes assessed against the real estate of the bankrupt were 'in excess of the value of the interest of the bankrupt estate therein,' and, if excessive, to reduce the same. This conclusion is further strengthened by the language of Mr. Justice Roberts in Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 51 S. Ct. 270, 272, 75 L. Ed. 645, wherein he says: 'Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation.'"

As heretofore noted, the Federal Courts are not in accord in their decisions on this question. However, it will be noted that the United States Supreme Court has passed on the same and has held that when the referee finds that the taxes assessed against the real estate of the bankrupt are in excess of the value of the interest of the bankrupt estate therein that he (the referee) has the right to reduce the same. The Supreme Court represents the final authority and has been followed by the Circuit Court of Appeals in each case heretofore cited, while the courts holding to the contrary in each instance are district courts.

Therefore, after a consideration of the authorities heretofore cited, and reviewed, I am of the opinion that where the bankruptcy court finds that the taxes assessed against the real estate of the bankrupt estate are in excess of the value of the interest of the bankrupt estate therein that he has a right to reduce the same.

In answer to your second inquiry, be advised that upon the order of the bankruptcy court you may allow the tax paid in accordance with said order.

In answer to your inquiry number three, I am of the opinion, after a careful review of the authorities heretofore set out in answer to your first inquiry, that the bankruptcy court has exclusive power to place the value upon the property of the bankrupt estate.

In answer to your fourth inquiry, be advised that under authority of **People v. Jersawit,** 263 U. S. 493, 44 S. Ct. 167, 68 L. Ed. 405; **In re Brown,** 41 Fed. (2) 228, you are entitled to collect taxes due on bankrupt's realty, with interest to date of payment. It is my opinion that if the bankruptcy court reassesses the property of the bankrupt estate and reduces the taxes, interest at the rate provided by law to be collected on delinquent taxes should be collected on the amount of the taxes as reduced.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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April 28, 1939.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Counties—

County governing body held to have authority to pay rent for property on which Civilian Conservation Corps Camp is located in the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 19, 1939, in which you request my opinion as follows:

"I respectfully request your opinion as to whether or not a county is authorized to pay rent to a property owner for a site upon which a C. C. C. Camp, engaged primarily and solely in soil conservation and reforestation work, may be located.

"As an example:

"A soil conservation camp is located near Auburn, in Lee County; and the owner of the property upon which it is situated has been allowing

the camp the use of his land for a very nominal rent. He now notifies the officials of the camp that he will not sign a new lease, for the year beginning May 1 for less than $200.00 per year.

"The Government makes no provision for such a camp to pay rent out of Federal funds; and, in order to save the camp for the County, and to finish work already in process, the Commissioners Court has been appealed to, to furnish funds for the payment of the rent.

"This camp is engaged in setting out pines, black locusts, and other trees; in terracing lands, in constructing outlet ditches from the lands into the various highways and roads; and in sodding the shoulders of roads and bank slopes for the County—at no cost to the County or to the property owners. In addition to the development and construction of terraces, drains, and forests, it is doing many other phases of work so necessary for the conservation of our soils, roads, and forests.

"As we are very anxious to notify the officials of the camp by the end of this week, if possible, as to what they may expect from the County, your immediate attention to this request will be deeply appreciated."

I am of the opinion that your inquiry should be answered in the affirmative.

Section 6755 of the Code of Alabama, 1923, as amended, which is the section dealing with the general authority of county governing bodies, reads in pertinent part as follows:

"The court has authority—* * * (23) To set aside, appropriate and use county funds or revenue for the purpose of developing, advertising, and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties."

The work done by the persons located at this Civilian Conservation Corps Camp is succinctly stated in your letter of inquiry and certainly results in a development and promotion of the agricultural and timber resources of your county, and, consequently, it is my opinion that the above-quoted provision of our statutory law contains ample authority for the county governing body of your county to pay from county funds the rent on the property on which this Civilian Conservation Corps Camp is located. Such an expenditure of county funds would be "for the purpose of developing * * * and promoting the agricultural * * * timber * * * resources" of your county.

The holdings of the following opinions of this office are apt authority for the conclusion herein announced: Opinion to Hon. G. C. Brittain, County Treasurer, Calhoun County, Anniston, Alabama, under date of November 15, 1933, Biennial Report of Attorney General, 1932-34, page 430; opinion to Hon. D. B. Borden, Chairman of the Court of County Commissioners, Hale County, Greensboro, Alabama, under date of December 29, 1934, Biennial Report of Attorney General, 1934-36, page 46; opinion to Col. Page S. Bunker, State Forester, Capitol, under date of June 13, 1935, Biennial Report of Attorney

General, 1934-36, page 181; opinion to Hon. J. Proctor Smith, Chairman pro tem, Board of Commissioners, Madison County, Huntsville, Alabama, under date of July 3, 1935, Biennial Report of Attorney General 1934-36 page 201; opinion to Board of Revenue Barbour County, Clayton, Alabama, under date of November 9, 1937, Quarterly Report of Attorney General, Vol. IX, page 80; and they are here cited in support thereof.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 2, 1939.

Hon. A. R. Forsyth,
Director of Finance,
Department of Finance,
Capitol.

Constitutional Amendments Election—

Ballots and other supplies for said election should be purchased by the Judges of Probate of the various counties in Alabama, at State expense, provided the expenses of said election can be paid by the State under the provisions of the Constitution.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 17, 1939, in which you request my opinion as follows:

"Please note attached letter from L. W. Price, Judge of Probate, Conecuh County, concerning ballots and other supplies for the July Amendments Election.

"Kindly advise me your opinion as to our authority to make these purchases."

The letter to you from Judge Price, which you enclosed, is as follows:

"Please advise the method which will be approved by your Department for the purchase of election ballots and other supplies for the July Amendments Election. Under the law, the counties are supposed to buy the election supplies but, since the State is to pay for these supplies, I wonder if your Department will purchase them or the method you will require the counties to use in their purchase."

It is my opinion that the ballots and other supplies to be used in the Constitutional Amendments Election to be held in July, 1939, should be purchased

by the Judges of Probate of the various Counties in Alabama, but at the expense of the State, instead of at the expense of the various counties of the State, provided the expenses of said election can be paid by the State under the provisions of the Constitution.

Section 496 of the Code of Alabama, 1923, provides as follows:

"Section 496. Blank forms and stationery for election.—The judge of probate for each county shall have printed, at the expense of the county, ballots, blank poll lists, certificates of results, oaths, and any other stationery or blank forms necessary in the conduct of election. The judge of probate shall also superintend and insure the delivery by the sheriff to the inspectors of the election of the ballots, blank poll lists, certificates of results, oaths and other stationery or blank forms necessary in the conduct of the election."

You will note that this section requires the Judge of Probate of each county to have printed the ballots and other supplies necessary in the conduct of elections, all at the expense of the county.

However, Sections 4 and 4-a of Acts Nos. 7, 8, 12, 15, and 19 of the Extraordinary Session of the Legislature, 1939, passed respectively on March 29, 1939, March 29, 1939, March 29, 1939, March 31, 1939, and March 31, 1939, which are the acts submitting to the electors of the State of Alabama the proposed constitutional amendments to be voted on in the election called for in said acts on the second Tuesday after the expiration of three months from and after the final adjournment of said Extraordinary Session of the Legislature (the second Tuesday in July), read as follows:

"Section 4. The officials for such election shall be appointed and such election shall be held in all things in accordance with the laws governing general elections except that the expenses of said election shall be paid out of the State Treasury, provided the same can be paid by the State under the provisions of the Constitution."

"Section 4-a. That there is hereby appropriated out of the General Funds, or any available funds of the State, such sums as may be necessary to defray the expenses of this election."

It can be seen from a reading of these two sections of said acts that said election shall be held in all things in accordance with the laws governing general elections except that the expenses of said election shall be paid out of the State Treasury, provided the same can be paid by the State under the provisions of the Constitution and that an appropriation is made out of the General Funds, or any available funds of the State, of such sums as may be necessary to defray the expenses of said election.

In my judgment, the only effect of these provisions is to change the source of payment of the expenses of said election from the treasuries of the various counties of the State to the Treasury of the State of Alabama, provided the source of payment of said expenses can be so transferred and be paid by the State under the provisions of the Constitution. They could not be held to have the effect of superseding, altering or changing, in so far as this election is concerned, any of the other provisions of Section 496 of the Code of 1923, supra, and, therefore, I advise you that the Judges of Probate

of the various counties of the State, and not you, as Director of Finance, should purchase, at State expense, provided the expenses of said election can be paid by the State under the provisions of the Constitution, the ballots and all other supplies to be used in the Constitutional Amendments Election to be held in July, 1939, in compliance with the mandatory provisions contained in said Section 496.

The provisions of the Department of Finance Act, (Act No. 112, General Acts, Regular Session, 1939, approved March 7, 1939) have been examined and Sections 5 and 23 thereof read, in pertinent part, respectively as follows:

"Section 5. FUNCTIONS AND DUTIES OF THE DEPARTMENT OF FINANCE. The general functions and duties of the Department of Finance shall be as follows: *** (14) To require the periodic reporting of all purchases of furniture, fixtures, supplies, material, equipment and other personal property, except printing, and all contracts and leases for the use or acquisition thereof by or for counties, the purchase, contract, or lease price of which is $100 or more, and to require information in connection therewith, to prescribe forms and fix the time for submitting such reports, **and, when requested by any county, municipal corporation, political subdivision and other local public body (including any board of education) to make such purchases, contracts or leases for it.** It shall be the duty of every county to make such report on forms furnished by the Department of finance, whenever requested so to do, but not more than once every thirty days." (Italics supplied.)

"Section 23. THE DIVISION OF PURCHASES AND STORES: THE PURCHASING AGENT. There is hereby established in the Department of Finance the Division of Purchases and Stores, which shall be headed by and be under the direction, supervision and control of an officer, who shall be designated the Purchasing Agent, to be appointed by the Director of Finance, with the approval of the Governor. The functions and duties of the Division of Purchases and Stores shall be as follows: *** (2) To perform the functions and duties of the Department of Finance with respect to purchases and contracts and leases for the acquisition or use of any personal property by or for the counties, municipal corporations, political subdivisions and local bodies in the State, including the preparation of forms for the reports required of the counties and the receipt and examination of such reports."

Pursuant to these provisions of said act you, as Director of Finance, in the manner therein provided, may purchase the ballots and other supplies to be used in said election for any county in the State of Alabama which request that you do so. Cf. Opinion of the Attorney General to Hon. J. J. Whiddon, Member, Board of Revenue, Houston County, Dothan, Alabama, under date of March 28, 1939, a copy of which is herewith enclosed for your information.

No opinion is expressed herein on the question of whether or not the expenses of said Constitutional Amendments Election can be paid out of the State Treasury under the provisions of the Constitution of Alabama of 1901.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 4, 1939.

Hon. Ed. H. Dolbear,
1357 Spring Hill Avenue,
Mobile, Alabama.

Jury Commission—

Act No. 59, General Acts 1939, abolishes jury boards and salaries incident thereto as of March 2, 1939, in Mobile County.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of March 11, 1939, in which you request my opinion as follows:

"I have been clerk of Jury Commissions and of the last Jury Board which was recently abolished by an Act of the Legislature, for 28 years or more, and I shall be pleased to have an opinion as to the following:

"By a Local Act I have been receiving a salary as Clerk of the Jury Board of Mobile County of one hundred dollars per month, and served as such up to the passage and signing of the new law abolishing Jury Boards which I understand was approved March 2nd, 1939, or thereabouts.

"I was paid my salary on March 1st, for the month of February, 1939, and I want to know what is rightly due me under the law for the part of the month of March which I served, considering I was on a monthly salary of one hundred dollars a month and paid monthly on the first day of each month, at the time of the passage of the new law."

Act No. 59, General Acts 1939, abolishing jury boards in the State of Alabama, was approved on March 2, 1939. The Governor's approval of this Act made it become a law effective on that date. **Branch Bank at Mobile v. Murphy,** 8 Ala. 119; **State v. Stearns,** 200 Ala. 405, 76 So. 321; **Montgomery Traction Co. v. Knabe,** 158 Ala. 456, 48 So. 501.

The Act says in Section 1:

"That a jury commission be and the same is hereby established in every county in this state."

In the case of **Shepherd v. Clements,** 224 Ala. 1, 141 So. 255, it was said:

"Where the clear general intent of the Legislature is to establish a uniform system throughout the state the presumption must be that local acts are intended to be repealed."

Therefore, I am of the opinion that Local Act No. 95, General and Local Acts 1933, page 30, establishing your office and fixing your salary was repealed

by the passage of the general law abolishing such jury boards and establishing jury commissions.

While Section 25 of the 1939 Act, supra, provides:

> "That all laws, general, local or special, in conflict with any of the provisions of this Act be, and the same are hereby repealed, it being the intention of the Legislature that the subjects covered by this Act be the exclusive law on such subjects, except that nothing herein shall be construed as repealing, modifying, extending or limiting in any way the Act of the Legislature of Alabama, approved October 7, 1932, appearing in Acts of Special Session of 1932, at page 89, et seq., not the Act of the Legislature of Alabama, approved March 17, 1936, appearing in Acts of Special Session of 1936, at page 6, et seq. Nor the Act of the Legislature of Alabama, approved July 15, 1931, appearing in General Acts of 1931, at page 455, et seq. nor the Local Act of the Legislature of Alabama, approved November 9, 1932, appearing in Local Acts of Special Session of 1932, at page 98, et seq., nor the Act of the Legislature of Alabama passed over the Governor's veto on June 18, 1931, appearing in General Acts of Regular Session of 1931, at page 301, et seq., but all of said Acts shall remain in full force and effect",

all the acts referred to in said Section 25 are acts relating to Jury Boards, jury boxes, etc. in Jefferson County except the act appearing in General Acts, 1931, p. 201, passed over the Governor's veto on June 18, 1931, which said act creates a Board of Jury Supervisors in all counties of the population classification in which the only county included is Montgomery County.

It is said in **Touart v. State,** 173 Ala. 453, 56 So. 211, that "the abolishing of an office terminates the right of the incumbent to exercise the rights and duties thereof."

It is necessary to determine the time at which your office was abolished. It is said in the case of **Wood v. Fort,** 42 Ala. 641, that public statutes are in force during the **entire day of their approval.** Also see the case of **Turnipseed v. Jones,** 101 Ala. 593, 14 So. 377 and **62 Corpus Juris, page 978.** From the above citations it will be seen that the Act in question was in force during the entire day of March 2, 1939, and you are entitled, therefore, to pay for that day. However, since you served one day, March 1, prior to the passage of the repealing act, you are entitled to one day's pay, computed on the basis of your monthly salary of $100.00.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 4, 1939.

Hon. J. R. Alldredge, Chairman,
Board of Finance & Control,
Cullman County,
Cullman, Alabama.

Counties—

Cullman County—Not authorized to pay expenses of members of Board of Finance & Control in attending Commissioners Court meeting. Act No. 30, H. B. 152, approved February 15, 1939, created Road & Bridge Commissioner of Cullman County and divested the Board of Finance & Control of all authority and jurisdiction over the establishment, construction and maintenance of public roads and bridges in Cullman County. An opinion of the Attorney General rendered to the Clerk of the Board of Revenue of Montgomery County on May 10, 1935, (Biennial Report of Attorney General 1934-36, page 160) authorizing the payment of expenses of members of boards of revenue, courts of county commissioners and other like governing bodies for attending meetings in Montgomery for the purpose of promoting the construction and maintenance of public roads and bridges, is not now applicable to the Board of Finance & Control of Cullman County.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 19, 1939, in which you request my opinion as follows:

"You will please find enclosed copy of resolution passed by The Board of Finance & Control of Cullman County, Alabama which has reference to membership fee and expense account of County Commissioners of like governing bodies while attending meeting of Association of County Commissioners.

"Please be referred to an opinion by Attorney General's office dated May 10, 1935 by Assistant Attorney General Screws with reference to the above question. Also please be referred to Local Law known as the Robertson-St. John Law creating the office of Road & Bridge Commissioner of Cullman County and approved by Governor Dixon February 15, 1939.

"Please give me your opinion if the Board of Finance & Control membership fee and expenses can be paid from the Road & Bridge Funds of Cullman County in line with Attorney General ruling of May 10, 1935, also taking into consideration the Local Law approved February 15, 1939. Also advise if your answer is in the negative, can these expenses be paid from any funds in the General Fund not otherwise appropriated.

"I wish to state in connection with the above that the State Comptroller's office requires the above Road & Bridge Commissioner of Cullman County to file a monthly operating statement with the Board of Finance & Control of Cullman County and requires the Board of Finance & Con-

trol to post these operating statements to our accounts in order that our records may reflect the true financial condition of all County Funds and also requires that we embody them in our Financial Statement published semi-annually, copy of which is enclosed."

Under Act No. 126, H. B. 241, approved April 14, 1936, (Local Acts 1936, page 70) the Board of Finance & Control of Cullman County was created in lieu of the former Court of County Commissioners.

Act No. 30, H. B. 152, approved February 15, 1939, (a Local Act of Cullman County) created the office of Road & Bridge Commissioner of Cullman County. Said Act gave said Road & Bridge Commissioner complete supervision over roads and bridges of Cullman County, Section 5 of said Act provides, in part, as follows:

"Section Five: Said Road and Bridge Commissioner of Cullman County, Alabama, is hereby vested with general and exclusive jurisdiction and superintendence of public roads and bridges in the establishing, construction and maintaining of public roads and bridges and may establish new roads and change and /or discontinue old roads in the same manner and to the same extent as now exercised by the Board of Finance and Control of Cullman County, Alabama, and all the jurisdiction, powers and authority now conferred by law on the Courts of County Commissioners, or Boards of Revenue, or Boards of Finance and Control, or other governing bodies of the several counties of the State under the general laws of the State, or any local law applicable alone to Cullman County, Alabama, as to public roads and bridges of Cullman County, Alabama, be and the same are hereby conferred on the Road and Bridge Commissioner of Cullman County, Alabama, and all jurisdiction of the Board of Finance and Control of said county over the public roads and bridges and Road and Bridge funds of said county, is hereby abolished. *** "

It will be noted that the Board of Finance & Control of Cullman County was divested of all jurisdiction, power and authority over the roads and bridges of said county. Any jurisdiction, power or authority which was theretofore vested in said Board is now in the Road & Bridge Commissioner. In other words, the Road & Bridge Commissioner now stands in the shoes of the Board of Finance & Control in so far as the roads and bridges of Cullman County are concerned.

The opinion of this office rendered to the Clerk of the Board of Revenue of Montgomery County on May 10, 1935, (Biennial Report of Attorney General 1934-36, page 160) to which you refer, holds that the county may pay the expenses of members of boards of revenue, courts of county commissioners or other like governing bodies for attending meetings in Montgomery for the purpose of promoting construction and maintenance of public roads and bridges by means of educational lectures, exhibits and demonstrations at its meetings. Said opinion, in my judgment, is not now applicable to the Board of Finance & Control of Cullman County. The expenditures dealt with in said opinion were confined to meetings connected with the construction and maintenance of public roads and bridges of the county. Since the Board of Finance & Control of Cullman County is now divested of its road and bridge duties said opinion is not applicable to that body. However, it is applicable to the newly created Road & Bridge Commissioner of Cullman County.

There is no authority to pay the expenses in question out of any funds in the general fund not otherwise appropriated. (See opinion of Attorney General to the State Comptroller on May 3, 1935, a copy of which is herewith enclosed, and opinions therein cited.) The making of said expenditures by the county can be justified only on the theory of their relationship to road and bridge duties. Therefore, it follows that your second inquiry should be answered in the negative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 4, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—

Where a person has taken out a license and thereafter moves the business so licensed to a place in which a higher license is required, such higher license must be procured, and there is no provision for a credit on the new license of the amount paid for the original license.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for official opinion of February 10, 1939, which is as follows:

"Please advise me on the following:

"In October 1938 a party in this county bought Auto Accessories license for a location outside of Wetumpka. He has now moved his entire stock of accessories within the city limits on which the schedule calls for a higher license. The business at the original location has been discontinued and the owner is the same. Can we allow him the original purchase price on the new and higher license and just charge him the difference in the two or should we collect for the new license at face value and not allow for the purchase price of the first license?"

It is my conclusion that you cannot allow the licensee in question credit for the original purchase price on the new license, and must collect for the new license at its face value.

I wish to refer you to Section 349 of the 1935 Revenue Act, Act No. 194, General Acts of Alabama, page 557, which is as follows:

"SECTION 349. When a person has obtained a license to engage in or carry on any business, employment or profession at any definite place in the county or city in Alabama, and desires to remove to any other place within the same county or city where license was granted and wishes his license altered accordingly, the Probate Judge who originally issued such license shall make such alteration which alteration shall be shown in the license record of the Probate Judge's office. **Provided, that no license shall be altered to change a place of business to a location requiring a higher license than originally paid.** (Emphasis supplied).

You will note that the above quoted Section 349, specifically prescribes that no license shall be altered to change a place of business to a location requiring a higher license than originally paid. Therefore, a person who has taken out a license and thereafter moves the business so licensed to a place in which a higher license is required, must take out such higher license before engaging in business in such new place.

Since the statute is silent in regard to rebates, there is no authority for allowing same, and it is my opinion that you must collect the full amount as provided by Schedule 16 of Section 348, General Acts of Alabama, 1935.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 4, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Comptroller—County Treasurers—

The rights and duties conferred upon the Comptroller by Act No. 26 of the General Acts of 1935, page 43, have been transferred to the Director of Finance under the Department of Finance Act of 1939, and Director of Finance, and not Comptroller, now has power to require County Treasurer to keep separate bank account of each county fund.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated April 11, 1939, which is as follows:

"Please refer to Act No. 26 (General Acts 1935, page 43) and advise me as follows:

"1. Has the Comptroller authority under such Act to order a County Treasurer to keep separate bank accounts, in the bank designated as his Depository, as to each fund, such as General, Road and Bridge, Sinking, etc., instead of depositing all funds in one account?"

Section 1 of the Act referred to in your request reads in part as follows:

"The State Comptroller, with the approval of the State Auditor and the Chief Examiner of Accounts, is hereby required to prepare as soon as practicable after the passage and approval of this act, such forms of bookkeeping and accounting books, records, reports and other blanks as may be necessary for the installation of a uniform system of accounting and reporting in and for the county officers of this State wherein the officers thereof are charged with any duties of receiving and disbursing public funds and other funds, and to transmit to such officers copies of such forms."

This act is very broad in its application and I am of the opinion that under the provisions of this act, the comptroller, prior to the passage of the Department of Finance Act of 1939, had the power to require County Treasurers to keep separate bank accounts of the various funds coming into their hands.

I call your attention to Section 11 of the Department of Finance Act of 1939, which section abolishes the office of State Comptroller, and confers all the powers and duties heretofore given to the Comptroller on the Director of Finance.

I quote the pertinent part of Section 5 of the Department of Finance Act:

"The general functions and duties of the Director of Finance shall be as follows: *** (15) To examine and audit the records and accounts of all State and county officers, bureaus, boards and commissions, institutions and departments, as now provided by law or which may hereafter be provided by law; and to prepare forms for a uniform system of State and County records and accounts as now provided by law."

The functions and duties of the Department of Finance relating to counties, except those relating to the purchase of personal property, etc. are to be exercised by the Division of Local Finance, through the Chief of said Division, as provided in Section 25 of said Act.

Section 21 of the Department of Finance Act establishes the Division of Comptroller and Accounts, and sets out the powers and duties of the Comptroller, who is the head of this Division. I find nothing in this section conferring upon the comptroller the authority to direct or instruct county treasurers as to how they should keep their records or accounts. This Section 21 is the only section of the Department of Finance Act which confers any powers or duties upon the Comptroller.

It is, therefore, my opinion, that the authority to order county treasurers to keep separate bank accounts as to each fund, such as General, Road and Bridge, Sinking, etc., is now conferred upon the Director of Finance. However, I am of the opinion that this function could be reassigned to the Comp-

troller under Section 26 of the Department of Finance Act by the Director of Finance, with the approval of the Governor.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 4, 1939.

Hon. M. K. Marshall,
Tax Assessor,
Randolph County,
Wedowee, Alabama.

Insane person's exemption—

1. Veteran rated totally and permanently disabled by reason of insanity by Veterans' Bureau and for whom guardian has been appointed under provisions of Uniform Guardianship Act exempt from ad valorem taxes on property to value of $2,000 (General Acts 1936-37, p. 90).

2. Adjudication of insanity is conclusive of insanity only at time of inquisition and not anterior or subsequent thereto, but gives rise to presumption of insanity at time party subsequently seeks exemption under Section 2(f) of 1935 Revenue Act, which presumption may be rebutted by Tax Assessor having knowledge of facts to the contrary.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 16, 1939, in which you request my opinion as follows:

"The writer, M. K. Marshall, as Tax Assessor of Randolph County, Alabama, wants to ask you for an opinion or an answer to the following inquiry:

"I will use the names and facts as they really are:

"One Miss Ruth McCosh is the Guardian for one, Willis A. Dye, who is an ex-service man, in other words, a World War Veteran. Willis A. Dye was adjudged insane under the old procedure back about 1920, as incompetent, and as being insane. He has had as Guardian since then, and has a Guardian now; as stated, Miss McCosh is acting as Guardian. Willis A. Dye, as such incompetent, or a non compos mentis, owns 75 acres of land, which is of one body, part of which is in Randolph and part of

which is in Chambers County. Miss McCosh, the Guardian, tells me that the Veterans Bureau has demanded that she have his real estate exempt from Ad Valorem taxation, the property is worth less than $1,000. Although Mr. Dye has a Guardian, and classed as a non compos mentis, he is out and goes about some, and is not confined to an insane institution, and I take the position, under those circumstances, that his land is not entitled to be exempt from Ad Valorem taxation.

"Those are the facts. The query: Is his Guardian right in her contention that this land should be exempt from Ad Valorem taxation?"

You do not state in your inquiry whether Mr. Dye has, since having been adjudged insane under the old procedure back about 1920, been so adjudged under the so-called "Uniform Veterans' Guardianship Act" approved June 6, 1931, as amended.

If Mr. Dye has been rated permanently and totally disabled by reason of insanity by the Veterans' Bureau and the guardian has been appointed for him under the provisions of the Uniform Guardianship Act, then all of his property to the value of $2,000 would be exempt from ad valorem taxation by virtue of Act No. 72, approved February 9, 1937 (General Acts, 1936-37, p. 90).

However, if Mr. Dye has not been rated permanently and totally disabled by reason of insanity under the provisions of the Uniform Guardianship Act, then, in my opinion, there arises an entirely different situation.

You state in your letter that Mr. Dye was adjudged insane "under the old procedure back about 1920." I presume from this statement that there was a proper adjudication of insanity by a court duly authorized to enter such decree.

The effect of an adjudication of insanity has been held to be as follows:

"An adjudication of insanity substitutes for the presumption of sanity a presumption of insanity which is presumed to continue until the contrary is shown."

32 C. J. 646, Section 224, and cases cited in annotation thereto;

Houston v. Grigsby, 217 Ala. 506, 116 So. 686.

In view of this rule of law, it is my opinion that upon presentation to you by Mr. Dye, or his guardian, of proof of such prior adjudication of insanity and of proof that such decree has not been subsequently set aside, it is your duty, in the absence of available information causing you to believe to the contrary, to grant to him as an "insane person" the exemption authorized by such person by Section 2 (f) of the 1935 Revenue Act.

Your attention is called, however, to the fact that the rule of law hereinabove stated regarding the presumption of insanity is not conclusive proof of such insanity subsequent to the time of such adjudication. It has been held in effect by the Supreme Court of Alabama in **Aetna Life Ins. Co. v. Cornelius,** 226 Ala. 452, 147 So. 632, that although the judgment of insanity has never

been revoked the court may inquire as to the insanity vel non of the party seeking to classify himself as an insane person. The court further states that the remoteness of time lessens the presumptive effect of the adjudication. Thus, it would appear that if there comes to your knowledge such facts as cause you to be of the opinion that the party seeking the exemption was or is, in fact, sane at the time he seeks the same, you would be justified in refusing to grant such exemption. In the event of any subsequent proceeding to test the right of such a person to the exemption claimed, the burden of rebutting the presumption of insanity arising from the adjudication to that effect would be upon you, since, in such a case, you are the party making the claim adverse to such presumption. **Houston v. Grigsby, supra.**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 4, 1939.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

License Tags—National Youth Administration—

Cars owned and operated by the Federal Government in National Youth Administration work are not subject to the license tag tax.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of March 14, 1939, in which you request my opinion as follows:

"Enclosed you will find copies of letters from National Youth Administration, in which they ask that tags be issued by the Probate Court without cost.

"Are they entitled to these tags under the Revenue Code of Alabama, Amending Section 334, Schedule 1, Sub-section 31?"

It is my opinion that your inquiry should be answered in the affirmative, if the vehicles used in the National Youth Administration work are Government owned and operated.

In the General Acts of 1935, page 1099, we find Act No. 511, Section 1 of which provides in part as follows:

" *** That there shall be exempted from the operation of the privilege or license tax and registration fee *** within the State of Alabama, passenger vehicles **owned and operated** by the Federal Government ***."

It will be seen from the above-quoted excerpt that where the vehicle is owned and operated by the Federal Government it is exempted from the license tax. The letters which accompany your request state that the vehicles in question are Government **owned.** The National Youth Administration was established within the Works Progress Administration by Executive Order No. 7086 of June 26, 1935, under authority of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935. See Vol. 49 U. S. Statutes at Large 1608, and Public Resolution No. 11 of the 74th Congress. It is very clear from the above citations that the National Youth Administration is an **agency** of the Federal Government.

It is my opinion that if the proper proof is given to you in accordance with the law that these vehicles are **owned** and **operated** by the Federal Government or its agency, the National Youth Administration, that you should issue license tags for said vehicles without charging the usual fees for registration or licensing thereof.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 4, 1939.

Hon. O. L. Andrews,
Clerk of Circuit Court,
Jefferson County,
Birmingham, Alabama.

Highway Patrol—Witness Fees—

Under General and Local Acts 1936-37, page 188, total allowance for mileage to State Highway Patrol is limited to twenty-five miles. This should not be construed to mean fifty miles.

Opinion by Assistant Attorney General Vardeman.

Dear Sir:

I have your letter of April 11, 1939, in which you request my opinion as follows:

"In the General and Local Acts 1936-37, page 188 is an Act which among other things regulates the witness fees and mileage for State Highway Patrol Officers,—the following proviso:

" 'Provided, however, that allowance for mileage shall be limited to the actual number of miles traveled and in no case to exceed 25 miles.'

"Please give me your opinion as to whether this means 25 miles each way or a total of 50 miles for the round trip or a total of 25 miles for the round trip traveled."

It is my opinion that the statute quoted in your inquiry means twenty-five miles for the round trip traveled. The general rule in regard to the interpretation of statutes is that where the language is unambiguous the clearly expressed intent must be given effect and there is no room for construction. **L. & N. R. R. Co. vs. Western Union Telegraph Company,** 195 Ala. 124, 71 So. 118; **Quillen vs. McClendon,** 210 Ala. 562, 98 So. 797. Where a statute is clear and unambiguous, there is no room for construction. **State vs. Praetorians,** 226 Ala. 289, 146 So. 411.

Here the statute makes no mention of mileage for both ways but instead says "the actual number of miles traveled." Then it limits this by stating "and in no case to exceed twenty-five miles."

It is my judgment that the limit of twenty-five miles means actual miles traveled and not twenty-five miles there and then in addition twenty-five miles back. It should not be construed to mean fifty miles.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 4, 1939.

Hon. W. J. Nash, Jr., Judge,
Inferior Court of Blount County,
Oneonta, Alabama.

Municipalities—License on Insurance Companies.

A municipality cannot impose a penalty for failure to obtain a license by an insurance company contrary to Section 287 of the Insurance Laws of the State of Alabama.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of March 8, 1939, in which you request my opinion as follows:

"The Town of Oneonta, Alabama, has provided in its License Schedule that all licenses of any kind and nature are delinquent after January

31st of each calendar year, for that calendar year; including Insurance Company licenses. An insurance company has denied liability for the penalties under their schedule, citing the Insurance Laws of the State of Alabama, as codified and dated June 1st, 1928, under Section 287; stating that the Schedule of the Town of Oneonta, Alabama, provided a penalty before the date allowed by the State laws, and since the schedule of the Town of Oneonta, Alabama, was in conflict with the State Laws, as mentioned above, and hence was null and void.

"Kindly advise at your earliest convenience whether or not you believe the Company to be right in its contention, or whether the Town has a right to fix the time of delinquency for the payment of licenses, and impose a penalty for failure to pay same, subsequent to the date fixed by such Town."

It will be noted that Section 287 of the Insurance Laws of Alabama, codified as of June 1, 1928 and brought forward as Schedule 160.13 of the 1935 Revenue Act, provides that insurance companies doing business in towns and cities in the State of Alabama shall furnish the executive heads of the towns and cities in which they do business a statement showing the amount of their gross premiums received during the preceding year from policies issued during such year to citizens of such towns and cities, and that license or privilege tax shall be paid in accordance with Section 285 of the Insurance Laws of Alabama, now superseded by Schedule 160.11 of the 1935 Revenue Act.

The above mentioned Section 287 and Schedule 160.13 provide that the Insurance companies shall file such statement showing their gross premium receipts during the preceding year on December 31 of each year, or within sixty days thereafter. Before it can be determined how much license or privilege tax is due from such insurance companies, the statement showing their gross premium receipts must be filed, as the amount of license is based on the gross premium receipts during the preceding year. If the insurance companies wish to take advantage of the sixty day extension given them under said section and schedule before filing the statement of their gross premium receipts, it could not be determined how much license tax was due from such insurance companies until March 1 of each year.

You state in your request that the license schedule adopted by the town of Oneonta imposes a penalty on all persons, firms or corporations who do not take out a license to do business on or before January 31 of each year. It, therefore, follows that Section and Schedule above noted and the license schedule of the Town of Oneonta imposing such penalty, are in conflict. A city ordinance cannot repeal an Act of the Legislature, neither can it rise above it. Article IV, Section 89, Constitution of Alabama, 1901; Hewlett v. Comp. 115 Ala. 499, 22 So. 137; Jackson v. City of Sylacauga, 25 Ala. App. 244, 144 So. 125; **Dunn v. Board of Revenue of Wilcox,** 85 Ala. 144, 4 So. 661.

It is, therefore, my opinion that the license schedule of the Town of Oneonta, in so far as it seeks to impose a penalty on insurance companies for not taking out a municipal license to do business in said town, on or before January 31 of each year is null and void.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 5, 1939.

Hon. Chris J. Sherlock,
Highway Director,
Montgomery, Alabama.

Highway Department—Assignments—

Highway Department has authority to draw warrant or warrants payable to assignee upon receipt of assignment of a vendor for materials received under an assigned purchase order to the assignee, provided the assignment is a valid one, there are no intervening equities and the contract is not purely personal.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 2, 1939, in which you request my opinion as follows:

"Please advise if this department upon receipt of assignment of a vendor on a purchase order would have the authority to draw warrant or warrants payable for the material received under an assigned purchase order to the assignee. The particular instance involved is as follows:

"The Southern Bitumen Company transfers and assigns delivery on purchase orders numbers 944945, 944933, 944934, 944932 to the Tuskegee Asphalt Corporation, and this office is in receipt of notice of this assignment and wishes to be advised whether or not the warrants in payment of deliveries can be made direct to the assignee instead of to the original vendor."

I am of the opinion that your inquiry should be answered in the affirmative provided the assignment in question is a valid one, there are no intervening equities and the contract is not purely personal.

Ordinarily an assignee acquires the same rights, no greater and no less, than those possessed by the assignor, and which, by assignment, the latter has conveyed to the former. In fact, it is generally held that the assignee simply steps into the shoes of the assignor. **Upchurch v. West,** 234 Ala. 604, 176 So. 186.

Where a specific execution of a contract would be decreed between the original parties to it, it would be decreed between the parties claiming under them by assignment, unless some new equity intervenes, which is insisted on in bar of the specific execution. **McMorris v. Crawford,** 15 Ala. 271. However, contracts that are purely personal are not assignable. **Crawford v. Chattanooga Savings Bank,** 201 Ala. 282. 78 So. 58.

In view of the above, it is my opinion that the warrant or warrants may be drawn payable to the assignee in question for the materials received under

the assigned purchase order, provided that the assignment is valid, there are no intervening equities and the contract is not purely personal.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 8, 1939.

Hon. C. E. Carmichael,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Counties—Gasoline Tax—Issuance of interest-bearing warrants—

1. County governing body has authority to pay three per cent commission for the marketing of interest-bearing warrants of the county, for the payment of which the revenue anticipated from the receipts of the State Excise Tax on gasoline is pledged, said three per cent commission to be paid out of the procceds received from the sale of such interest-bearing warrants.

2. Under authority of Acts, Extra Session, 1936, page 28 and Section 1397 (110) of Michie's Code of 1928, county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts of State Excise Tax an gasoline, to pay valid outstanding claims incurred on account of the construction and maintenance of public roads and bridges.

3. Under authority of Section 1397 (110) of Michie's Code of 1928, county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts of State Excise Tax on gasoline, to obtain funds to be used in the construction and maintenance of county roads and bridges.

4. Neither the Comptroller nor the Director of Finance has any authority, power, functions or duties in regard to the issuance by the counties of interest-bearing warrants, for the payment of which the revenues anticipated from the receipts of the State Excise Tax on gasoline is pledged, nor do either of said officers have to be given notice before the issuance of such warrants.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 27, 1939, in which you request my opinion as follows:

"I enclose a copy of the Minutes of the Commissioners Court of this County, of March 15, 1939, and a copy of a contract pertaining to the sale by the County of interest-bearing gasoline warrants of the County in the sum of $118,500.00, in which the Gasoline Tax is to be pledged.

"I desire a ruling from you upon the following questions:

"1. Can I legally draw a warrant for the payment of the 3% commission to the purchasers, said warrant to be paid out of the money to be received from the sale of said gasoline warrants?

"2. Can the warrants be issued for the purpose of paying existing indebtedness against the Gasoline Fund of the County, and also to secure additional funds for operation of the County in the matter of construction and maintenance of roads?

"3. Does the law now require that such warrants be approved by the Comptroller?

"I will greatly appreciate your ruling upon these questions, and any other point that may occur to you touching the legality of the matter.

"As it is contemplated that this transaction will be before the Court of County Commissioners again for final action within the next few days, I will appreciate your ruling without delay."

The copy of the minutes of the Commissioners' Court of your county under date of March 15, 1939, and of the contract pertaining to the sale of these warrants, which were enclosed in your letter, are as follows:

"STATE OF ALABAMA )
COLBERT COUNTY ) March 15, 1939.

"The Court of County Commissioners of Colbert County, Alabama, met pursuant to adjournment at the Courthouse, on this the 15th day of March, 1939. There were present C. E. Carmichael, Chairman, Melvin Harris, Paul Coburn, Raymond Sherrill and A. B. Blackburn, Commissioners.

"Messrs. Walter B. Gaines of Milhous, Gaines & Mayes, Hugh Morrow, Jr., of Watkins, Morrow & Co., M. J. Brodnax and Roy Knight, of Brodnax & Co., Investment Brokers, all of Birmingham, Alabama, appeared before the Court of County Commissioners and discussed the proposition for the County to issue and sell $118,500.00 of County Gasoline interest-bearing warrants for the purpose of paying outstanding claims due by the County against the Gasoline Fund, and for providing funds for the operation of the County in the maintenance or construction of roads in the County, and also including therein the expenses in the way of commissions of the purchasers in handling said warrants. The said representatives of the Investment Companies present bid before the Court for the purchase of said warrants and finally a proposition was made by the representatives of the three Companies present that they would jointly purchase the warrants to bear interest at a rate of 4% per annum and to receive as their charge or commission and expenses for handling said war-

rants 3% of the principal amount of the warrants issued, and after discussion of this proposition, Commissioner A. B. Blackburn moved that the said proposition be accepted by the Court of County Commissioners. This motion was seconded by Commissioner Raymond Sherrill, and a vote being taken, Commissioners Blackburn, Sherrill, Harris and Coburn voted for its adoption.

"It was understood that these warrants were not to be general obligations of the County but a pledge of a sufficient amount of the Gasoline Fund to be received by the County from the State as is necessary to pay the principal and interest as it matures.

"Said warrants to mature serially over a period of not exceeding five years by deducting monthly payments from the State Gasoline tax revenue to be apportioned to the County from the County's share of the Gasoline tax.

"The following contract was entered into between the Investment Companies and the Court of County Commissioners:

" 'Court of County Commissioners,
Tuscumbia, Ala. March 15, 1939.

" 'For $118,600.00 legally issued Colbert County Alabama State Gasoline Revenue Warrants, same to bear date of April 1, 1939, to mature without option of prior payment serially up to five years, to bear interest at the rate of 4% per annum, payable semi-annually, to be in denomination of $1,000.00 and $500.00, principal and interest to be payable at Bank to be designated by us, upon delivery of said warrants to us at Tuscumbia, Ala.

" 'This offer is for immediate acceptance and prompt delivery of said warrants, and conditioned upon their receiving and unqualified approval of our attorneys as to legality of issue and sale, and the sufficiency of tax and taxing powers to provide sufficient funds for the payment of principal and interest when due. You are to promptly furnish us with a complete certified transcript of all necessary proceedings in connection with issuance and delivery of said warrants within 30 days from date hereof.

" 'We hereby agree to pay you par and accrued interest to date of delivery for said warrants for our services in connection with these warrants. You hereby agree to pay us 3% of the face value of warrants so issued. Such payment to be made at the time of delivery.

Respectfully submitted,

Brodnax & Company, Inc.,
By M. J. Brodnax, Pres.

Watkins, Morrow & Co.,
By Hugh Morrow, Jr.

Milhous, Gaines & Mayes,
By Walter B. Gaines.

" 'Accepted and agreed to be a resolution duly passed by the Court of County Commissioners, this 15 day of March, 1939.

C. E. Carmichael,
Probate Judge and Ex-Officio

Chairman of Court of County Commissioners.'

"STATE OF ALABAMA )
COLBERT COUNY )

"I, C. E. Carmichael, Probate Judge and Ex-Officio Chairman of the Court of County Commissioners of said County and State, hereby certify that the foregoing is a true and correct copy of the Minutes of the Commissioners Court held at the Courthouse on March 15, 1939, relating to the sale of $118,500.00 of Gasoline Tax interest bearing warrants, as the same appears on the records in Commissioners Court Minutes I.

"Witness my hand and seal of the Probate Court, this March 27, 1939.

C. E. Carmichael,
Probate Judge and Ex-Officio

Chairman of the Court of County Commissioners."

In my opinion, the county governing body of your county has the authority to pay three per cent commission for the marketing of the interest-bearing warrants of the county, for the payment of which the revenue anticipated from the receipts of the State Excise Tax on gasoline is pledged, said three per cent commission to be paid out of the proceeds received from the sale of such interest-bearing warrants, as provided in the motion or resolution contained in said minutes and in the said contract; and consequently you, as Probate Judge and Ex-Officio Chairman of the county governing body of your county, are legally authorized to draw a warrant for the payment of this three per cent commission out of the moneys to be received from the sale of said warrants. This office has previously written to this subject in an opinion to Hon. J. M. Gray, Chairman, Walker County Commission, Jasper, Alabama, under date of November 6, 1934 (Biennial Report of Attorney General, 1934-36, p. 23), in which we held that the preparation of bond blanks, the securing of legal opinions relative to bonds, and the selling of same were necessary incidents to the consummation of the purpose of a bond issue and that, therefore, the county had the authority to pay a commission for these services.

In answer to your second question, we respectfully refer you to an opinion of this office rendered to Hon. J. C. Grady, Judge of Probate, Chambers County, Lafayette, Alabama, under date of February 1, 1939, a copy of which is enclosed for your information, which deals with this identical question or these identical questions.

On the question of the authority of a county to issue interest-bearing warrants, for the payment of which revenue anticipated from the receipts of the State Excise Tax on gasoline is pledged, for the purpose of paying existing indebtedness against the gasoline tax fund of the county, we held in that opinion as follows:

"Under authority of Acts, Extra Session, 1936, page 28 and Section 1397 (110) of Michie's Code of 1928, county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts of State Excise Tax on gasoline, to pay valid oustanding claims incurred in the year 1938 (the indebtedness there dealt with having been incurred in the year 1938), on account of the construction and maintenance of public roads and bridges."

On the question of the authority of a county to issue such warrants for the purpose of securing additional funds to be used in the construction and maintenance of county roads and bridges, we held in that opinion as follows:

"Under authority of Section 1397 (110) of Michie's Code of 1928, county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts of State Excise Tax on gasoline, to obtain funds to be used in the construction and maintenance of county roads and bridges."

In answer to your third inquiry, we advise you that the law does not require that the issuance of such warrants be approved by the State Comptroller.

By Act No. 112, General Acts, 1939, approved March 7, 1939, commonly known as the Department of Finance Act, certain provisions are made concerning the issuance of bonds by the counties and other political subdivisions of the State. Section 5 of said act reads in pertinent part as follows:

"Section 5. FUNCTIONS AND DUTIES OF THE DEPARTMENT OF FINANCE. The general functions and duties of the Department of Finance shall be as follows: *** (20) To investigate, whenever it shall deem proper, the ability of any county, municipal corporation, political subdivision or other public body to pay or repay any proposed new general obligation, special assessment, revenue or other bonds, payable from any source whatsoever, including funding and refunding bonds, together with the effect of such proposed issue on the general financial condition of such county, municipal corporation, political subdivision or other public body, and, upon the conclusion of such investigation, to advise such county, municipal corporation, political subdivisions or other public body whether in the judgment of the Department of Finance, the issuance of such proposed bonds will have a deleterious or other effect upon the credit or general financial condition of such county, municipal corporation, political subdivision or other local body. No such advice shall be binding upon such county, municipal corporation, political subdivision or other local public body, and the failure of such county, municpal corporation, political subdivision or other local public body to follow or be guided by such advice shall have no adverse or other effect upon the validity of bonds issued contrary thereto. To the end that said Department of Finance may have an opportunity to make such investigation and give such advice, it shall be the duty of such county, municipal corporation, political subdivision or other local public body to advise the said Department of Finance in writing, of its intention to sell any such proposed bonds at least two weeks before the sale thereof."

However, you will notice that these provisions are applicable to bonds only and not to warrants. There is a marked distinction between a "warrant" and

a "bond." In the case of **State ex rel Radcliff v. City of Mobile et al,** 229 Ala. 93, 155 So. 872, the Supreme Court of Alabama in opinion by Mr. Justice Knight, spoke as follows on the question of the difference between warrants and bonds:

> "But it must be borne in mind that there is a marked distinction between a 'warrant' and a bond. 'Warrants are general orders payable when funds are found, and there is propriety in the rule providing that they shall be paid in the order of presentation, the time of presentation to be indorsed by the treasurer on the warrants.' Shelly v. St. Charles County Court (C. C.) 21 F. 699, 701."

Therefore, we advise you that these provisions of the Department of Finance Act do not apply to interest-bearing warrants issued by the counties, for the payment of which the revenues anticipated from the receipts of the State Excise Tax on gasoline is pledged, and that neither the Comptroller nor the Director of Finance has any authority, power, functions or duties in regard to the issuance of such warrants.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 8, 1939.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Licenses—Contractors—

One accepting a contract to erect an electrical transmission line from some given point to another given point, making the necessary excavations, erection of poles, crossbeams and other appurtenances and stringing or securing the electrical wires to such posts, is liable for a contractor's license under Schedule 42 of Section 348 of the Revenue Act of 1935.

Opinion of Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 4, 1939, in which you request my opinion as follows:

> "Your review of opinion issued by the former Attorney General found in Quarterly Report, Volume 11, p. 96, is requested, in hopes that same may be modified.

"The former opinion seems to have been based primarily on the definition of the word 'structure'. The manner of engaging in business of erecting or constructing electrical transmission lines involves the excavation for post holes, the erection of posts, attachment of cross arms, and the stringing of electrical transmission lines on such posts from some point to another point.

"I quote below the pertinent part of Schedule 42:

" 'Any person . . . accepting . . . contracts for doing any work on . . . **any structure,** requiring the use of . . . electric wiring . . . or who shall accept an order for or contract to excavate earth, rock or other material for the foundation **or any other purpose** . . . shall be deemed a contractor.' (underscoring provided).

"The word 'structure' is defined, . . . anything that is built or constructed.'—Brown v. City of Decatur, 188 Ill. App. 147.

"In Civil Code Proc. Sec. 1183, giving material-men a lien on the building or other structure, an electrical power line is a 'structure', it being attached to the soil to enhance its value and owner's comfort, etc.—Western Electric Co. v. Cooley, 251 P. 331, 333, 79 Cal. App. 770.

"In Schedule 42 (p. 233, Simon's Code), providing that any person accepting a contract for doing any work on or in a building **or structure** (emphasis supplied), requiring the use of paint, stone, brick, mortar, wood . . cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, electric wiring, shows that the word 'structure' comprehends all the properties specifically enumerated and is broad enough to include any similar things constructed, should the enumeration prove incomplete. 34 Pac. 702.

"The term 'structure' when applied to a material thing made by human labor, means something composed of parts or portions which have been put together by human exertion; and hence an oil well, together with a derrick, engine, boiler, pumps, piping, and appliances attached thereto, is a 'structure.'—Haskell v. Gallagher, 67 Am. St. Rep. 250.

"To summarize the above, your opinion is requested as to whether or not a person who has accepted a contract to erect an electrical transmission line from some given point to another given point, such person making the necessary excavations, erecting the poles, cross arms and other appurtenances, and stringing or securing the electrical wires to such posts, would come under the purview of Schedule 42 and subject him to the contractor's license based on the amount of the contract."

I am of the opinion that your inquiry should be answered in the affrimative.

Schedule 42 of Section 348 of the Revenue Act of 1935 provides in pertinent part as follows:

**"Any person, firm or corporation accepting orders or contracts for doing any work on** or in **any** building or **structure, requiring the use of**

paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead **electric wiring or other steel or any other building material,** or shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or other composition, or who shall accept an order for or contract to excavate earth, rock or other material for foundations or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick, terra cotta, or other material, or shall accept a contract to construct highways, bridges, dams, or railroads, shall be deemed a contractor. * * *" (Emphasis supplied).

The answer to your inquiry depends upon the proper construction of the word "structure" as used in the above-quoted schedule.

A "structure", in its broad sense, has been held to include any construction; anything composed of parts capable of resisting heavy weights or strains and artificially joined together for some special use; a permanent stationary erection; any production or piece of work artificially built up or composed of parts joined together in some definite manner; a production composed of parts artificially joined together according to plan and designed to accomplish a definite purpose; connected construction; something composed of parts or portions which have been put together by human exertion; that which is built or constructed. The term does not apply exclusively to things above the ground. **60 Corpus Juris 666.**

A "structure" is defined as anything that is built or constructed. **Brown v. City of Decatur,** 188 Ill. App. 147. An electrical power line has been held to be a "structure." **Western Electric Company v. Cooley,** 251 Pac. 331, 79 Cal. App. 777. The term has been held to include poles planted in the ground and connected together by wires and insulators for the transmission of electricity. **Forbes v. Williamette Falls Electric Company,** 23 Pac. 670, 19 Ore. 61.

From the above, and under the facts detailed by you, it is my opinion that the party in question, contracting for the construction of an electrical transmission line, is contracting for doing work on a structure requiring the use of electrical wiring.

The case of **Chaney v. State,** 225 Ala. 5, 142 So. 104, wherein it was held that the word "structure" did not include a gasoline pump, is not analogous to your inquiry. In that case the specific statute pertaining to burglary was construed.

The opinion in Quarterly Report of Attorney General, Vol. XI, page 96, to which you refer, was based on the assumption of fact that the work done was not to be on or in any building or structure. This opinion is hereby modified to conform to the above and is overruled in so far as same may be in conflict.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 8, 1939.

Hon. Sam Drinkard,
Ex-Sheriff Marengo County,
Linden, Alabama.

All outstanding witness claims in civil cases which have not been presented for payment to the county treasurer or custodian of county funds within three years are barred.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 8, 1939, in which you request my opinion as follows:

"Please render me an official opinion on the following question:

"Does Bill No. 33, (S. 59 Calhoun), approved February 16th, 1939, amending Section 7245 of the 1923 Code of Alabama with reference to presentation of witness claims within three years and transfer of unclaimed witness fees to Fine and Forfeiture Fund also apply to witness claims which have previously been registered against the Fine and Forfeiture Fund which have not been presented for payment within three years although there has been money in the Fine and Forfeiture Fund with which to pay same had they been presented, in other words should registered witness claims against the Fine and Forfeiture Fund which have been payable for three years or longer which have not been presented for payment during this time be barred from payment hereafter the same as if they had never been registered against the Fine and Forfeiture Fund."

Under Section 7245, Code of Alabama of 1923, all witness claims in civil cases are barred unless the same are presented for payment to the county treasurer or custodian of county funds within six years. This section was amended by S. B. No. 59, approved February 16, 1939, and by this amendment the statute of limitations was changed from six to three years. I do not think the party who receives a certificate of attendance as a witness in a civil case has such a vested right as to payment so far as the statute of limitations is concerned as may not be changed by a repealing or an amendatory act. The rule has been often stated that witnesses are entitled to compensation only under statutes providing therefor. They are not entitled to compensation in cases where the statute does not so provide and where a statute relating to the calling of witnesses makes no provision for their compensation, the witness is not entitled thereto. 7 C. J. 67, Section 62.

Inasmuch as the Legislature has the right to prescribe the amount of compensation to be received by witnesses, it necessarily follows that this gratuity awarded by the State may be made payable upon such conditions as the State may impose.

Thus, as the Legislature may limit the payment of witness compensation to those cases where the witness claims his fee in six years, there is no reason why the Legislature could not reduce the time of presentation to three years.

In the case of **Blake v. State ex rel Going et al,** 178 Ala. 407, 59 So. 623, the Supreme Court of Alabama, speaking through Mr. Justice Somerville, in construing an act which provided that certain witness fees should be payable to the county Treasurer and not to the State Treasurer as provided by a former act which was repealed, stated:

> "It is a general rule, also, that when a statute is repealed it stands as if it had never existed, except as to vested rights which have accrued under its operation.—36 Cyc. 1169. Under the act of 1909, the state had acquired no vested rights in the fees in question. Doubtless it had, prior to the act of 1911, a right to compel respondent to report and pay them over to the state treasurer as their appointed custodian. But, except as it had been already executed, the influence and operation of the act of 1909 was completely nullified by its repeal in 1911. 'The Legislature has full power to take away by statute, rights not vested, which have been conferred by statute. If the repealing statute is general and unconditional, without a saving of pending proceedings and prosecutions, these fall with the statute which may have authorized them.'—Luke v. Calhoun County, 56 Ala. 415. This principle seems clearly applicable to the two acts under consideration."

The conclusion reached in the Blake case was to the effect that the unclaimed witness fees sued for, which were not reported by the clerk of the court for which they were collected, would not so vest in the state as to give it a right which could not be taken away by statute. This conclusion is particularly applicable to the instant case. In the case of **Lee, Comptroller v. Cunningham,** 234 Ala. 639, 176 So. 477, Justice Brown of the Supreme Court of Alabama, in writing the opinion of the court on motion for rehearing, stated:

> "It is well-settled that the right to reclaim money voluntarily paid to the State or to the counties thereof, as taxes, is a creature of legislative grace which the legislature may restrict or limit by future legislation. First National Bank of Scottsboro v. Jackson County, 227 Ala. 448, 150 So. 690."

In the Jackson County case cited by Justice Brown, Justice Gardner deals at length with a statute amending a former act which permitted recovery for taxes paid under mistake to limit the period of recovery to one year instead of the six years previously allowed. The court says:

> "Plaintiff's last payment was made January 20, 1931. The present action was commenced on October 11, 1932. As originally enacted, the statute permitted a recovery within six years from the date of payment. Section 3146, Code 1923. But by the Act approved July 28, 1931 (General Acts 1931, p. 811), this section was rewritten with the single change of a substitution of one year in the place of six for the commencement of the suit, and it appears the present suit was brought more than one year after the approval of the amendatory act. This section and the two preceding constituted one act (General Acts 1907, p. 639), and were codified therefrom.
>
> "A county is a mere political subdivision of the state, and no right to a suit against it exists except by statute. Ex parte State, 52 Ala. 231, 23 Am. Rep. 567; Hamilton v. Jefferson County, 209 Ala. 517, 96 So. 628.

Prior to the enactment of what is now section 181 of the Code of 1923, the county was not subject to suit, and since that time and prior to the enactment here in question, any such suit was subject to the limitations of the present Code, section 228. Lowndes County v. Hunter, 49 Ala. 507.

"By the Act of 1907 (sections 3144-3146, Code 1923), therefore, the Legislature granted to taxpayers, who paid their taxes under an invalid law, a new privilege or benefit, for prior thereto no action would lie for taxes voluntarily paid. Raisler v. Mayor, etc. of Athens, 66 Ala. 194; Gachet v. McCall, 50 Ala. 307.

"As said in Luke v. Calhoun County, 56 Ala. 415: 'The legislature has full power to take away by statute rights, not vested, which have been conferred by statute.' See, also, Blake v. State, 178 Ala. 407, 59 So. 623. And speaking of the repeal of a statute conferring a right to sue the state, the court, in Ex parte State of Alabama, 52 Ala. 231, 23 Am. Rep. 567, said: 'Said statutes are matters of grace, confer privileges,—they do not create rights.* * * The power to withdraw is commensurate with the power to confer, and when the privilege is withdrawn, the citizen is remitted to the condition in which he stood when it was conferred.'

" 'When a right given by statute is not by nature a vested right and at the time of the repeal of the statute is still inchoate * * * it will fall with the statute, unless expressly excepted.' 59 Corpus Juris 1188.

"Illustrative of this general rule is the case of Ex parte State of Alabama, 52 Ala. 231, 23 Am. Rep. 567, where it was held that the repeal of the law authorizing suits against the state strips a court, in which such a suit is pending, of all jurisdiction to proceed further in the cause, and wherein was quoted with approval the following expression from Beers v. State of Arkansas, 20 How. 529, 15 L. Ed. 991: 'This permission (to sue the State) is altogether voluntary on the part of the sovereignty; it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.'

"So in the instant case the Legislature has granted to the taxpayer a new privilege to sue the county under such conditions and restrictions, among them, as originally enacted, a requirement that the suit be brought within six years. But the amendment in the Act of 1931 changes this period to one year, and we think the amended act is here to be construed as if the statute had been originally enacted in this amended form. 59 Corpus Juris 1096.

"There is here no element of contract involved, for, as said in Alabama v. United States, 282 U. S. 502, 51 S. Ct. 225, 226, 75 L. Ed. 942; 'Levying a tax does not create a contract. It is a unilateral act of superior power, not depending for its effect upon concurrence of the party taxed.' Differently expressed is the same thought in State v. Fleming, 112 Ala. 179, 20 So. 846, 847, cited approvingly in Turner v. State, 226 Ala. 269, 146 So. 601; 'In one sense, there is no element of contract in taxation, in that the taxing power imposes the tax and enforces its collection whether the party taxed assents or dissents.' True, in a proper case, recovery may be had in an action for money had and received (Ward v.

First Nat. Bank, supra), or in a civil action as for a debt (Turner v. State, supra). But this relates to a matter of remedy only and affords no foundation for the insistence that plaintiff here has been deprived of any vested right or that the application of the amended act to its case in any manner impairs the obligation of a contract.

* * *

"Plaintiff's right of recovery rested merely upon the privilege granted by the Legislature, which privilege was subject to be taken away or modified as the law-making body saw fit and without infringement of any constitutional right."

In my opinion, the doctrine set out above has a direct bearing on the matter here under consideration. It follows, therefore, that the statute of limitations with regard to the time for presenting and claiming witness fees being a matter of legislative grace under the authority above quoted, it may be changed by any future enactment. It is, therefore, my opinion that the act approved February 16, 1939, applies to all outstanding witness claims in civil cases which have not been presented for payment.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 10, 1939.

Hon. J. E. Kennedy,
Sheriff, Dallas County,
Selma, Alabama.

Sales Tax—Coca-Cola vending machine—

Mere placing of Coca-Cola vending machine in public location not unlawful, but sale by means of such machine where no tax is collected renders owner or operator criminally liable under Sections 26 and 27 of the Sales Tax Act (General Acts 1939, No. 18, H. 82, approved February 8, 1939).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 12, 1939, in which you request my opinion as follows:

"I have been requested to write you and get you to advise me whether or not it is legal to operate the coca-cola ice boxes where a coin is inserted for a drink without a token being paid.

"I shall very much appreciate your advising me about this at your earliest convenience."

In my opinion the mere **operating** of the Coca-Cola ice box where a coin is inserted for a drink would not in itself constitute a violation of Section 26 of the Sales Tax Act (General Acts Regular Session 1939, No. 18, H. 82, approved February 8, 1939).

Section 26 provides as follows:

"It shall be unlawful for any person, firm, corporation, association or copartnership engaged in or continuing within this State in the business for which a license or privilege tax is required by this Act to fail or refuse to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax provided herein, or the amount due by said taxpayer on account of any taxes provided herein, or the amount due by said taxpayer on account of any taxes provided under this Act, or who shall refund or offer to refund all or any part of the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same."

By Section 27 it is provided:

"Any person, firm, or corporation violating any of the provisions of Section 26 of this Act shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than Fifty ($50.00) Dollars nor more than One Hundred ($100.00) Dollars, or may be imprisoned in the county jail for not more than six months, or by both such fine and imprisonment, and each act in violation of the provisions of this act in violation of the provisions of this Act shall constitute a separate offense."

You will note that the prohibition is against any person, etc., engaged in or continuing within the State in the business for which a license or privilege tax is required by the Act to "fail or refuse to add to the sales price and collect from the purchaser the amount due by the taxpayer." The act condemned by Section 26 is not the sale of merchandise but the failure to collect the tax after the sale has been consummated. While we fully realize that machines have not in themselves the power to demand of the customer that he pay the tax before the bottled drink will be emitted (it not appearing that a machine has yet been devised which will release the bottle only in the event a token is also deposited in the slot together with the other coin), we are not at this time prepared to say that such sale by the machine is per se unlawful.

However, the person owning or operating the vending machine cannot evade the provisions of Section 26 through the medium of such machine. In the event that sales are made by the machine and no tax collected, the owner or operator thereof would be subject to the penalty provided by Section 27, it being apparent that **intent** is not an element of the offense defined by Section 26. See **State vs. Southern Express Company,** 200 Ala. 31, 75 So. 343; **Smith vs. State,** 136 So. 270.

It has been the observation of the writer that it is the common practice to attach a receptacle to the machine, which receptacle is marked "Deposit

Tokens Here" or in some other fashion calling attention to the fact that tokens should be paid by the customer. Despite such attachment, the owner or operator of such machine is criminally responsible for any illegal sales made by means of the machine, for it will be presumed that at the time the machine was placed in the location there existed a knowledge, born of common experience, that perhaps the machine would sell to persons who would fail to pay the tax. It is the duty of the owner or operator of such machine to so operate it or to surround it with such surveillance as will prevent prohibited transactions from being carried on, i. e., sales where no tax is collected. Where the owner or operator fails to furnish such protection and an illegal sale is made, he is criminally responsible under Sections 26 and 27, supra. Cf. Opinion to Hon. Fred H. McDuff, Sheriff, Jefferson County (Quarterly Report of Attorney General, Vol. XIII, page 16).

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 10, 1939.

Hon. J. F. Lee, Sheriff,
Greene County,
Eutaw, Alabama.

A Sheriff is entitled to a fee of fifty cents for serving subpoena in justice court.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of April 17, 1939, in which you request my opinion as follows:

"In cases where the sheriff acts as Constable, and the defendant is sentenced to the Penitentiary from the Circuit Court is the Sheriff entitled to fifty cents for serving subpoenas in the Justice Court."

I am of the opinion that your inquiry should be answered in the affirmative. It is my judgment that the Sheriff is entitled to a fee of fifty cents for serving a subpoena, as allowed by Section 3741 of the Code of 1923, regardless of the fact that he performed this service in a court of a justice of the peace, where such service is ordinarily performed by a constable. Section 10199 of the 1923 Code of Alabama provides as follows:

"Section 10199. May perform duties of constables; fees and liability.—The sheriff is authorized to execute all mesne and final process which is required of constables, and shall receive the same fees and compensa-

tion therefor; and he and his sureties on his official bond shall be liable for any abuse of the process that he may execute under this section."

Sheriff's fees for services rendered in preliminary proceedings in a criminal case, however, have been declared by the courts not to be reduced by the operation of the above statute. **Trapp vs. State ex rel Burgin,** 122 Ala. 394, 25 So. 194; **Quarterly Report of Attorney General, Vol. II, page 118.**

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 10, 1939.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

1. The owner of lands sold at foreclosure under the terms of a mortgage cannot redeem from a tax sale of such lands after his right of redemption from the mortgage foreclosure sale has expired.

2. Property sold for taxes may be redeemed within three years from the date of sale, but the person offering to redeem must have an interest in the same.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of April 10, 1939, in which you request my opinion as follows:

"380 acres of land in Marshall County which was owned by Roy May of Andalusia, Alabama, was sold by the Tax Collector of Marshall County on June 16, 1936 for 1935 taxes and costs. On Nov. 18, 1938, the Certificate of sale was transferred by the State to R. H. Artis. The lands involved in above sale and transfer of certificate were mortgaged to Andalusia National Bank and the mortgage was foreclosed Aug. 30, 1935. Thomas A. Dixon as Receiver of the Andalusia National Bank, as Trustee, became the purchaser of the lands at foreclosure sale. The Reconstruction Finance Corp. then succeeded to the title of the Trustee.

"Mr. May is now making application to redeem from the tax sale but has never redeemed from the mortgage sale. Attorneys for the R. F. C. contend that the right of redemption lies with them.

"Please advise me who has the right to redeem from the tax sale."

From the facts stated, it seems that Roy May owned 380 acres of land in Marshall County, which was subject to a mortgage in favor of The Andalusia National Bank; that the mortgage was foreclosed on August 30, 1935, at which time Thomas A. Dixon, as trustee, became the purchaser, and that the Reconstruction Finance Corporation has succeeded to the title of the trustee. It also appears that Mr. May and the Reconstruction Finance Corporation are both trying to redeem the land and that you desire to know who has such right. Before answering your question, it might be advisable to examine the facts and determine what interest, if any, each has in the property at this time.

The property was sold at foreclosure on August 30, 1935, therefore, we must examine the statutes in reference to the redemption of property from such sale.

The following rule of law seems to define the rights and interest of a purchaser at foreclosure sale:

Purchasers at a mortgage foreclosure sale get a fee simple title subject to be divested only by the mortgagor and others by exercising their statutory right of redemption within two years in the manner provided for by law. **Toney vs. Chenault,** 85 So. 742, 204 Ala. 329; **Arnold vs. Black,** 87 So. 170, 204 Ala. 632; **Hargett vs. Franklin County,** 103 So. 40, 212 Ala. 423. From the principles of law laid down in the above cases, it seems that the Reconstruction Finance Corporation owns this property in fee so far as the foreclosure sale is concerned.

The following rule of law seems to define the interest of a mortgagor and those claiming under him in land upon which he has given a mortgage which has been foreclosed: The statutory right of redemption within two years as provided for by law is a personal privilege belonging to those entitled to redeem and is not a property right or interest. **Allison vs. Cody,** 89 So. 238, 206 Ala. 88; **Michie's Code of 1928,** Section 10156.

Based upon the rules of law laid down in the above cases, it seems that Mr. May for a period of two years from the foreclosure sale had a right of redemption only; that the right of redemption was in the nature of a personal privilege and was not an interest in the property.

For your information, I am quoting Section 268 of the General Acts 1935, page 368, which sets forth in detail who may redeem from a tax sale and when such redemption must be perfected:

> "Section 268. Real estate which hereafter may be sold for taxes and purchased by the State may be redeemed at any time before the title passes out of the State, or if purchased by any other purchaser, may be redeemed at any time within three years from the date of the sale by the owner, his heirs or personal representatives, or by any mortgagee or purchaser of such lands, or in any part thereof, or by any person having an interest therein, or in any part thereof, legal or equitable, in severalty or as tenant in common, including a judgment creditor, or other creditor having a lien thereon, or on any part thereof; and an

infant or insane person entitled to redeem at any time before the expiration of three years from the sale. may redeem at any time within one year after the removal of his disability; and such redemption may be of any part of the lands so sold, which includes the whole of the interest of the redemptioner. If the mortgage or other instrument creating a lien under which a party seeks to redeem is duly recorded at the time of said tax sale, the said party shall, in addition to the time herein specified, have the right to redeem said real estate sold, or any portion thereof covered by his mortgage or lien, at any time within one year from the date of written notice from the purchaser of his purchase of said lands at tax sale, served upon such party, and notice served upon either the original mortgagee or lien holder or their transferee of record, or their heirs, personal representatives or assigns, shall be sufficient notice."

From the above, I am of the opinion that Mr. May cannot redeem from the tax sale, but such right does exist in favor of the Reconstruction Finance Corporation. **Quarterly Report of Attorney General, Vol. IV, page 130.** After August 30, 1937, Mr. May's right of redemption from the mortgage foreclosure sale was cut off and since that time, he has not had such an interest in the property as would entitle him to redeem from the tax sale.

I am not saying that Mr. May could or could not have redeemed from the tax sale before his right of redemption from the foreclosure sale was cut off (it not being here necessary to decide that question), but since his right of redemption from the foreclosure sale has expired, he cannot redeem from the tax sale.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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**May 10, 1939.**

Hon. W. T. Seibels, Solicitor,
Fifteenth Judicial Circuit,
Montgomery, Alabama.

Salary of the Solicitor of the 15th Judicial Circuit as set by Section 5510, Code of Alabama 1923, remains the same and the only affect that the Lapsley-Lusk Bill, herein cited, has upon said salary is the changing of the amount to be paid by the State and county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 2, 1939, in which you request my opinion as to what your salary is as Solicitor of the 15th Judicial Circuit and as to the application of what is known as the Lapsley-Lusk Bill to the same.

It is my opinion that the Lapsley-Lusk Bill (General Acts 1933, page 124) does not affect your salary as fixed by Section 5510, Code of Alabama of 1923. Your salary is fixed by Section 5510 at $5700.00 per annum. It is true that this section goes on to say that $3600.00 of this amount shall be paid by the State and the **remainder** shall be paid by the county. It is my opinion that all the Lapsley-Lusk Bill did was to reduce the amount paid by the State from $3600.00 to $3000.00, but did not change the amount fixed as your salary, namely, $5700.00. Instead of the amount paid by the State under Section 5510, the Lapsley-Lusk Bill simply fixed it at $3000.00 leaving the balance of $2700.00 to be paid by the county.

I think it is clear that it was the intention of the Legislature in the passage of what is known as the Lapsley-Lusk Bill, supra, not to change the amount of your salary but to fix the amount that would be paid by the State, leaving the balance, which in your case is $2700.00, to be paid by the county. To further substantiate this view, I call your attention to Section 1 of the Lapsley-Lusk Bill where it says:

> "* * * The salaries herein provided for the Circuit Judges and Solicitors or Deputy Solicitors or Assistant Solicitors is the amount of portion thereof to be paid by the State and nothing herein shall be construed to affect any provision of the law for the payment by any County of any additional amount of salary to any such officer or officers."

I also call your attention to an opinion of this office written July 3, 1935, to Hon. Bart B. Chamberlain, Solicitor 13th Judicial Circuit, Book 5-A, page 7, Attorney General's Reports, Office Edition, copy of which is herewith enclosed for your convenience.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 10, 1939.

Hon. G. C. Brittain,
Secretary, Board of Revenue,
Calhoun County,
Anniston, Alabama.

Sheriff's claim for waiting upon the Circuit Court where jury is is in attendance may be paid by the County where the account is attested by both the Clerk and the Sheriff that the same is true and correct.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 31, 1939, in which you request my opinion as follows:

"On February 15th, 1939, you rendered me an opinion in reference to a claim filed by Mr. P. W. Cotton, former sheriff of Calhoun County, Alabama.

"In that opinion you stated that the County was authorized to pay the claim of Mr. Cotton for attendance upon the Circuit Court during jury terms and that since the amount is fixed by law, the claim was not governed by Section 228 of the Code of Alabama of 1923.

"Upon receiving this opinion the Sheriff called on the clerk for a similar certificate covering the years 1935, 1936 and 1937. The Clerk gave the Sheriff a certificate as to the dates when the Circuit Court was in session with a jury in attendance and the amount due, if the Sheriff attended such sessions. Since the Clerk stated he did not have personal knowledge of the attendance during these former years, he was unwilling to include this in his certificates.

"The Sheriff has made affidavit that he attended court on these days and has prepared claims, attaching thereto the Clerk's certificate and the Sheriff's affidavit. I enclose a true copy of the claim as now filed.

"Please advise me whether or not that, following upon the former ruling given me as above referred to, Calhoun County would be authorized to pay this claim to Mr. Cotton, the former Sheriff."

I note what you say as to the above matter. It is my judgment that the Clerk's and Sheriff's certificates are sufficient, and under the opinion of this office, referred to by you, under date of February 15, 1939, I am of the opinion that the claim as now presented is in proper and legal form and the county is authorized to pay the same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 10, 1939.

Hon. A. R. Forsyth,
Director of Finance,
Capitol.

Department of Finance—The Chief of Service in the Division of Service, under the supervision and direction of the Director of Finance, may establish a substation of the central mailing room, with a separate meter, for those departments which, in his judgment, require separate mailing service.

Opinion by the Attorney General.

Dear Sir:

This is to acknowledge receipt of your letter of May 1, 1939, which is as follows:

"I attach letter from Mr. W. L. DeVan, Administrator of the Alabama Alcoholic Beverage Control Board, concerning the establishment of a branch of the State Mailing Room at the office of the Board which is located more than a mile from the Capitol.

"I respectfully suggest that under the Act creating the Department of Finance that it is within the discretion of the Director of Finance to establish a sub-station of the Mailing Department with a separate meter if such is necessary for efficiency in handling outgoing mail.

"If you concur with me in this opinion, please so advise."

The answer to your question depends on the construction of Section 24 of House Bill 72, approved March 7, 1939, the pertinent part of which is as follows:

"Section 24. THE DIVISION OF SERVICE; THE CHIEF OF THE DIVISION. There is hereby established in the Department of Finance the Division of Service, which shall be headed by and be under the direction, supervision and control of an officer who shall be designated the Chief of Service, to be appointed by the Director of Finance, with the approval of the Governor. The functions and duties of the Division of Service shall be as follows: (1) To provide and operate a central mailing room service for each department, board, bureau, commission, agency and office of the State located and operating in the City of Montgomery. All mail shall be delivered to such mailing room ready to be delivered to the United States post office, except that it shall not be stamped with postage stamp or by means of a postage meter. Every piece of mail, when so delivered, shall bear the name of the department, board, bureau, commission, agency or office of the State sending it and all mail received in the mailing room shall be properly stamped with postage stamps or passed through an authorized postage meter and then delivered to the United States post office. The chief of the Division of Service shall cause an accurate account to be kept of all pieces of mail from and the postage used on account of each department, board, bureau, commission, agency and office of the State, and the cost of such postage shall be charged by the Comptroller against its appropriation for such purpose. Such central mailing room shall be conveniently located and shall be kept open for business as long as may be necessary to dispose of all outgoing mail daily. The expenditure of any State funds for postage by any department, board, bureau, commission, agency or office of the State required to deliver its mail to the central mailing room (other than the Department of Finance) shall be illegal. This subsection shall not, however, prevent the stamping or metering of envelopes for the transmittal of unemployment compensation warrants and, warrants for the payment of any public assistant benefits in, or the mailing of such envelopes from, the department or departments having charge of the other functions and duties relating to unemployment compensation and public assistance."

In my judgment, it was the purpose of the Legislature in enacting this provision to prevent the unnecessary expenditure of State funds for mailing

purposes and to circumvent the use of State postage for personal or private use, and I do not think this result will be affected by the establishment of a branch mailing room. I am of the opinion that if the volume of mail going out of a department of State government is so voluminous as to require a separate postage meter that the Chief of Service of the Division of Service of the Department of Finance, with the advice and consent of the Director of Finance, may locate a branch of the central mailing room for that department. Of course, the expenditure of funds for postage shall be made in the same manner as for other departments.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 11, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Counties—

1. Expenses of Judge of Probate on trips in connection with P. W. A. grants and W. P. A. county projects not legal claim against county.

2. County governing body may reimburse Judge of Probate for expenses incurred on such trips under Section 186 of the Code of 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 4, 1939, in which you request my opinion as follows:

"A Probate Judge in a county where the judge is on a fee basis has filed and been paid claims for traveling expense on trips to Montgomery, Atlanta and Birmingham on business in connection with P. W. A. grant for building a jail, an addition to the courthouse and W. P. A. projects in the county, such trips being authorized by the County Governing Body.

"Please refer to the above facts and to your opinion of March 15, 1939, addressed to the writer, in which you held that expenses in the nature of mileage of the Probate Judge on trips in connection with public roads was a part of the $400.00 allowed for Ex-Officio duties and advise me as follows:

"(1) Would expenses of the Judge of Probate on trips in connection with P. W. A. grants and W. P. A. county projects be a legal claim

against the County or would same be a part of his regular Ex-Officio fees, and his Ex-Officio services in connection with public roads?"

Replying to your inquiry I wish to respectfully advise that the Judge of Probate has no legal claim against the county for services rendered or expenses incurred in the various trips which you state were made by him in connection with P. W. A. and W. P. A. projects for the county.

Certain it is that the Judge of Probate is not entitled to receive such compensation from either the $400.00 ex-officio fees provided by Section 7285 of the Code for discharging his duties in relation to public roads, nor from the $400.00 provided by said section for all other official duties for the compensation of which no express provision is made by law, for the reason that the expenses incurred on such trips were not in connection with public roads nor did they constitute the performance of any "other **official duty** required of him for which no specific fee is provided."

I do not find any other provision of law which entitles the Judge of Probate, as a matter of right, to be reimbursed for such expenditures. This office has repeatedly held that before such right exists, there must be a law which directly or which by necessary implication affords the officer the right to claim such compensation or remuneration. See also **Mobile County v. Williams, Judge,** 180 Ala. 639, 61 So. 963.

However, I am of the opinion that inasmuch as the expenses were incurred on trips in connection with the procuring of a P. W. A. grant for building a jail, an addition to the courthouse and the securing of grants for other W. P. A. projects in the county, such trips being authorized by the county governing body, the court of county commissioners may reimburse the Judge of Probate for the actual expenses incurred under Section 186 of the Code of Alabama, 1923. Said section provides as follows:

"Section 186. Equitable claims or demands against county; mode of payment provided.—**The court of county commissioners,** board of revenue, or other governing body **of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes:** First, **To reimburse any person,** firm or corporation, **who in good faith has** performed service, **advanced money,** or property **for the use of the county,** or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, **To refund to any person,** firm or corporation, **money,** or compensate him or it **for** services rendered or money or property **advanced and devoted to the use of the county, in procuring funds for** carrying on road improvement, tick eradication, or **any lawful public work, where, after the advancement of such money,** or property, or the rendition of such service, **it was declared by** decision of the supreme court, or by the **decision of the attorney-general that the county was without authority to pay such claims on account of** a defect in any law **or any other reason."** (Emphasis supplied).

Cf. Opinion of the Attorney General rendered under date of February 17, 1939, to Hon. Percy M. Pitts, Chilton County (holding county attorney might be paid under Section 186 for services rendered without authority of law); opinion to Hon. George Pegram, Marengo County, under date of February

27, 1939 (holding that claims for rent of filling station rented by county might be paid by county under Section 186 although barred by statute of limitations); opinion rendered under date of February 27, 1939, to Hon. Frank Pearce, Marion County (holding Tax Assessor's claim for compensation for making up plat book payable from Section 186 though claim not made within time required by law); opinion to Hon. I. I. Moses, Russell County, under date of March 29, 1939 (holding court of county commissioners might under Section 186 reimburse doctors who rendered county service, even though claims were barred by statute of limitations of three years relative to open accounts); opinion to Hon. G. W. L. Smith, Escambia County, under date of March 2, 1939, (holding county might pay deputy solicitor reasonable fee under Section 186 for certain legal services rendered); and opinion to Hon. G. C. Brittain, Calhoun County, under date of March 31, 1939, (holding the court of county commissioners might, under Section 186, reimburse sheriff for expenses incurred in providing adequate janitor service for jail, though such expenses were not warranted by law and claim for reimbursement was not presented within twelve months). We are enclosing herewith for your convenience copies of the above-mentioned opinions.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 11, 1939.

Hon. Frank M. Dixon,
Governor,
Capitol.

Expenses incurred by Governor in procuring adequate information upon which to base conclusion in clemency hearings held properly payable from either Governor's Emergency Fund or Governor's Contingent Fund but not by Department of Corrections and Institutions.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of April 12, 1939, in which you request my opinion as follows:

"Will you please advise as to whether or not the cost which will be incurred by following the procedure outlined in the attached letter may be paid out of the funds to the credit of the Department of Corrections and Institutions?

"If such cost can not be paid out of the funds of the Department of Corrections and Institutions, please advise what State funds may be used for this purpose."

The procedure which is outlined in the letter attached to your inquiry involves procuring from the Circuit Court, in those cases where a defendant

has received the death penalty and has applied to you for reprieve or commutation, certified copies of the indictment and minute entry of the judgment of conviction and, where not otherwise available, a transcription of such parts of the evidence as will fairly reflect the testimony upon which the case against the defendant was based and the testimony upon which his defense was based, together with such statement by the trial judge regarding the facts surrounding the trial as he might see fit to present.

In my opinion, the cost of procuring the foregoing information may not be paid from the funds appropriated to the Department of Corrections and Institutions (Act No. 91, H. 261, approved March 1, 1939). The only provision of the Department of Corrections and Institutions Act which could possibly authorize the payment of said Department of such costs is Sub-section 10 of Section 3, which is as follows:

> "The functions and duties of the State Department shall include the following: * * * (10) To assist and cooperate with the Governor in the administration of any law with respect to pardons and paroles so long as the Governor shall be charged with the administration of such law. * *"

You will note that the duty imposed upon the Department of Corrections and Institutions by the foregoing provision is to cooperate and assist the Governor in the administration of the laws relative to "pardons and paroles." Nothing is said therein with respect to rendering the Governor any assistance in the performance of his duties with respect to commutations, reprieves etc.

I am unable to find any cases wherein it has been held that "pardon and parole" are synonymous with the terms "commutation or reprieve" or even that the doctrine of **ejusdem generis** may be applied thereto. In fact, the cases seem to be in accord that the terms afford a wide difference in connotation. See Words & Phrases, "Pardons", "Paroles", and "Reprieves." It would appear, therefore, that had the Legislature, being aware, as we must presume it was of the construction of these terms, desired to impose the duty upon the State Department of Corrections and Institutions to cooperate with the Governor in the administration of the law with respect to the reprieve or commutation of sentence of prisoners having received the death penalty or to appropriate any moneys for such activities they might well have specifically so stated. Failing in this, it is my opinion that under the announced rules of statutory construction it cannot be said that the Department of Corrections and Institutions may make such expenditure.

Replying to your further inquiry as to the State funds which may be used for the purpose of defraying the costs incurred as hereinabove detailed, we advise that the same may be paid from the Governor's Contingent Fund created by Section 777 of the Code of Alabama, 1923, and for which an appropriation of $25,000.00 is made by the General Acts, 1935, page 793. Section 777 provides that the Contingent Fund may, in the discretion of the Governor, be used for the better enforcement of the laws of Alabama. This provision is very broad in its scope and is clearly authority for the payment of the costs incurred in following the procedure outlined hereinabove inasmuch as such procedure would undoubtedly redound to the better enforcement of the laws of Alabama. See opinion to Hon. B. M. Miller, Governor, under date of December 18, 1934 (Biennial Report of Attorney General, 1934-36, page 39); also opinion to Hon. M. C. Allgood, State Auditor, under date of October 26, 1918 (Biennial Report of Attorney General, 1918-20, page 38).

You are further advised that such expenses may also be paid from the Governor's Emergency Fund under the provisions of Subsection 10 of Section 1 (General Acts, 1935, page 794).

The Governor's Emergency Fund appropriation relates to the Governor's Emergency Fund set up by Section 37 (11) of Act No. 321 (General Acts, 1932, p. 330) which provides that out of said fund "the Governor may in his discretion pay any part or all of the expenses or appropriation now authorized by law," payment of which is not otherwise provided for. Inasmuch as there does not appear to be a particular fund from which the above expense may be paid, it is my opinion that the Emergency Fund may be legally devoted to its use. Cf. Opinion of Attorney General, Biennial Report 1934-36, p. 132.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 11, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Judgments—Costs and Fees—

1. Although only punishment imposed upon a defendant is a jail sentence, the costs may be taxed against him, even though he may not be sentenced to hard labor upon the nonpayment of the same.

2. Defendant cannot be sentenced to hard labor to pay costs in cases where only punishment imposed is a jail sentence.

3. When an execution issued on a valid judgment for costs is returned "No property found," fees of officers and witnesses can be a legal claim against the fine and forfeiture fund.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of February 2, 1939, in which you request my opinion as follows:

"Please refer to the following:

"The offense committed is a Misdemeanor punishable by fine and in addition to such fine, on conviction, the defendant may also be sen-

tenced to jail or hard labor. The defendant is found guilty and the court enters the following order: 'Adjudged guilty of ..... and sentenced to ..... day in jail.

"and advise me as follows:

"1. Is the judgment of the Court in this instance a proper and legal judgment?

"2. If your answer to Question No. 1 is in the negative, what is the duty of an Examiner of Accounts, examining such court, when such condition prevails?

"3. Could the defendant, in addition to the above sentence, also be sentenced to hard labor to pay the costs and if so, is it mandatory that he be sentenced to hard labor, as provided by law, for a sufficient number of days to pay the costs?

"4. Could execution legally issue for the costs in such a case and if so would the fees of Officers and witnesses be a legal claim against the Fine and Forfeiture Fund?

"5. If execution cannot legally issue, would the fees of officers and witnesses be payable from any fund of the County?"

and your subsequent note which states:

"This day in open Court came the State of Alabama By its Solicitor and the defendant in his own proper person and with his Attorney and defendant in open Court on this day agreed to go to trial on the original Affidavit in this case charging him with the offense of violating Section 3990 of the Code and waived arraignment on said original Affidavit and plead Guilty.

"Thereupon in open Court on this day, the defendant being asked by the Court if he had anything to say why the judgment and sentence of the law should not be passed upon him replied, 'he had not'; It is therefore considered and adjudged by the Court that the defendant is guilty of the offense of violating Section 3990 of the Code as charged in the original Affidavit, And that the State of Alabama, for the use of Mobile County have and recover of the defendant the costs of this prosecution and that the defendant be imprisoned in the County Jail of Mobile County, Alabama, for the term of three days."

In answer to your first question, it is my opinion that this is a legal judgment both as to form and substance. All of the elements requisitory to a valid judgment are present. This is, of course, assuming that your subsequent statement as set out above is the true form of the judgment rendered.

The defendant was indicted under a statute which imposes a fine and then allows the imposition of an additional sentence to a jail term or to hard labor, viz:

"Section 3990. Preventing persons from engaging in peaceful work or lawful industry.—Any person who, by force or threats of violence to

person or property, or by any means of duress, prevents, or seeks to prevent, another from doing work or furnishing materials, or from contracting to do work or furnish materials, for or to any person engaged in any lawful business, or who disturbs, interferes with, or prevents, or in any manner attempts to prevent the peaceable exercise of any lawful industry, business, or calling by any other person, must, on conviction, be fined not less than ten nor more than five hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than twelve months."

Section 5286 of the Code provides:

"Section 5286. When jury need not impose fine, but leave punishment to court.—When an offense may be punished, in addition to a fine, by imprisonment or hard labor for the county, the jury shall not be required to impose a fine; but, if in their judgment, the defendant should only be punished in some other mode, may, in such case, only find him guilty and leave the imposition of the punishment to the court."

This gives the judge, when the jury finds the defendant guilty and does not fix his punishment, the authority in cases being prosecuted under such statutes as this, supra, to use his discretion as to whether the defendant will be sentenced to a term in jail or to hard labor. He cannot impose a fine in such a case. **Harkey v. State,** 13 Ala. App. 203, 68 So. 699.

Where there is no jury due to the failure of the defendant to demand trial by jury or his plea of guilty, the judge is in those instances clothed with the power of both the jury and the court.

In such a case, the assessment of a fine is not a prerequisite to the validity of a judgment sentencing the defendant to a term of imprisonment in the county jail or hard labor for the county. **Deck v. State,** 23 Ala. App. 304, 124 So. 505. Cf. Opinion to Hon. B. P. Singleton under date of April 19, 1939.

In the instant case, the judge chose to impose a jail sentence as punishment for the violation of Section 3990, supra. In my opinion, he was acting with authority.

The judgment for costs is present and in proper form. In the case of **Ex parte Hill,** 122 Ala. 114, 26 So. 230, the court said:

"The sole authority for sentencing a convict to hard labor on account of costs is found in the statutes."

We think that it is likewise true that the power to impose the payment of costs on the defendant in any case rests entirely with the statutes. Therefore, where the defendant has plead guilty and has been so adjudged, it is in accordance with the statutes regulating the imposition of the costs on a convicted defendant that he be assessed with the costs in the proceeding. The various and sundry statutes regulating all cost assessments have been complied with in the rendition of this judgment for costs. We know of no statute making the imposition of costs on a convicted defendant conditioned on whether or not he may be sentenced to hard labor upon nonpayment of the same, and in our judgment the costs may be imposed upon him even

though he may not be sentenced to hard labor upon nonpayment of the costs.

The answer to your first question obviates the necessity of an answer to your second question.

You ask in question number three if the defendant can be sentenced to hard labor to pay the costs, and if so is it mandatory that he be sentenced to hard labor. It is my opinion that a defendant cannot be sentenced to hard labor for non-payment of costs when the only punishment prescribed is a jail sentence. Since the defendant's punishment was a sentence to a term in jail, it appears that Code Section 5291 concerning sentences for hard labor and payments of costs therewith, would not be applicable since it says, "If on conviction judgment is rendered against the accused that he perform hard labor for the county, etc." The defendant can, therefore, in my opinion, be sentenced to hard labor for costs only if he has been fined or sentenced to hard labor on the criminal charge. In other words, it is a condition precedent that punishment be fixed at hard labor or a fine imposed before a defendant can be sentenced to hard labor to pay the costs incurred.

**Ex parte State in re Long,** 87 Ala. 46; **Ex parte Hill,** 122 Ala. 114; **Hollis v. State,** 123 Ala. 74, all stand for the proposition that the imposition of a fine or the sentence to hard labor is a condition precedent to sentencing the convict to hard labor for payment of costs. 16 C. J. 1310, et seq., more or less sums up the import of the cases in Alabama on this point by saying, "Where the jury fixed punishment at imprisonment only and no fine is imposed, the court cannot sentence to hard labor for costs." Therefore, it is my opinion that in the instant case it is not possible for the defendant who has been sentenced to a term in jail for his punishment to be sentenced to hard labor for the payment of costs.

In answering question four, it is my opinion that a legal execution for payment of costs can be issued in this particular case. If such execution is issued and returned "No property found", then the fees of officers and witnesses each can become a legal claim against the fine and forfeiture fund. See Vol. VIII, Quarterly Report of Attorney General, page 152. Also see case of **Hendon v. Delvichio,** 137 Ala. 594, in which it is said that payment from the fine and forfeiture fund must necessarily be conditioned upon a valid judgment. Therefore, since it is my opinion that this is a valid judgment, this can become a legal claim against the fine and forfeiture fund after execution has been issued and returned "No property found."

Since question four is answered in the affirmative, it is not necessary to answer question five.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 11, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Members' term on Jury Board runs from first Monday after the second Tuesday in January to the same date in the next year.

Any amount drawn in excess of the maximum amount allowed under Section 5 of General Acts 1931, page 55, as amend by General Acts 1933, page 136, would be illegal.

An appointee to an unexpired term on the Jury Board is entitled to such compensation as provided for in the act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of March 6, 1939, in which you request my opinion as follows:

"Please refer to Act of 1931 creating Jury Boards (General Acts 1931, page 55) as amended by Act of 1933 (General Acts 1933, page 136) and advise me as follows:

"1. Is the year of the Members' term referred to in Section 5, from the first Monday after the second Tuesday in January to the first Monday after the second Tuesday in the succeeding January?

"2. Would any amount drawn from January ..... to January ..... in excess of the maximum amount allowed by Section 5 be an illegal expenditure of County funds?

"3. In the event a member dies or resigns during a term year and such member has drawn the maximum amount allowed, could his successor draw any amount for service rendered during the remainder of such term year?"

In reply to your inquiry, I wish to advise that it is my opinion that the members' term referred to in Section 5 of the 1931 Act is from the first Monday after the second Tuesday in January to the first Monday after the second Tuesday in January of the succeeding year. In an opinion of this office under date of March 12, 1935, Biennial Report of Attorney General, 1934-35, page 106, this same holding is stated and reference is made to Section 3 of said act, which is here quoted:

"That within ninety days after the passage and approval of this act, the Governor shall appoint the members of each jury board, whose term of office shall be as follows and until their successors are appointed and qualified. One member shall hold office until the first Monday after the second Tuesday in January, 1932, one member shall hold office until the same date in 1933, one member shall hold office until the same date

in 1934. The Governor, in making such appointments, shall designate the terms to be held by each appointee respectively and upon the expiration of each of these terms, the Governor shall appoint successors, who shall hold office for three years from the expiration of the term of office of their respective predecessors."

Your second inquiry must be answered in the affirmative. Prior to the passage of the 1933 amendment, any amount in excess of the maximum allowed under Section 5 of the 1931 act would be an illegal expenditure. After the passage of the 1933 amendment, any amount in excess of the maximum allowed under Section 5 of the 1933 act would be an illegal expenditure. However, during the year 1933, it is my opinion that the maximum amount that could be drawn during the term year should not exceed the maximum under the 1931 act, upon the condition, however, that the amount drawn after April 19, 1933, the date of the passage of the 1933 act, during the remainder of the term year, should not exceed the maximum provided for in Section 5 of the 1933 act.

Your third inquiry must be answered in the affirmative. In the event of a vacancy on said board, the newly appointed member would be entitled to draw the sum of five dollars per day while engaged in the discharge of his duties during the remainder of the term year of his predecessor, but not to exceed the maximum amount provided for by law. Your attention is directed to an opinion in Quarterly Report of Attorney General, Vol. X, page 5, where a similar ruling is given.

This office, following the practice of our courts, does not pass upon the constitutionality of an act unless specifically requested to do so. Therefore, no consideration has been given to the validity of the 1933 act.

The opinion of this office rendered on January 6, 1934 (Biennial Report of Attorney General, 1932-34, p. 459) is corrected and amended insofar as it conflicts herewith.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 11, 1939.

Hon. A. R. Forsyth,
Director of Finance,
Capitol

Highway Department—Counties—

Highway Department has authority to accept county warrants, payable in not exceeding ten years, from county's anticipated receipts of gasoline tax for indebtedness to Highway Department incurred in contract with county in construction and maintenance of roads and bridges in said county; and to negotiate said warrants to

private investors or with Alabama State Highway Corporation, provided such be to the best interest to Highway Department and also a good and sound business policy.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 9, 1939, in which you request my opinion as follows:

"Various counties of the State are indebted to the State Highway Department in sums aggregating about one million dollars.

"It is proposed to allow these counties, or some of them, to settle this indebtedness by delivering to the Highway Director their warrants, payable monthly over several years, from proceeds of the counties' portion of the tax on gasoline.

"Please advise me whether or not—

"1. The State Highway Director has authority to accept such warrants from the counties in settlement of their indebtedness.

"2. If he has authority to accept such warrants, has he authority to negotiate them either to private investors or with the Alabama State Highway Corporation, turning the proceeds into the Public Road and Bridge Fund?"

Before answering your inquiries, I wish to state that under Act No. 13, S. 23, approved February 3, 1939, a State Highway Department was created, the chief executive of which is designated as the State Highway Director. All the authority, powers and duties of the former Highway Commission or Department were transferred to the new department.

Further, I am assuming that the indebtedness of the counties, to the State Highway Department were incurred for the construction, maintenance or repair of the public roads and bridges in the respective counties.

I am of the opinion that your first inquiry should be answered in the affirmative.

Section 27 of the Highway Code of 1927, which is Section 1397(29) of Michie's Code of 1928, provides as follows:

"1397(29). Contracts with counties, municipalities, etc.—The State Highway Department may enter into contracts with any of the counties of the state, or with any of the municipalities of this state as it may with individuals, firms or private corporations, to do any work in the construction, repair or maintenance of the roads, bridges or highways in this state."

In a recent opinion of this office to the Judge of Probate of Chambers County on February 1, 1939, which reviews the decisions of the Supreme Court and the other opinions of this office, it was held (1) that under authority of Section 1397(110) of Michie's Code of 1928, county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts of State Excise Tax on gasoline, to obtain funds to be used in the construction and maintenance of county roads and bridges; and (2) that under authority of Acts, Extra Session, 1936, page 28 and Section 1397(110) of Michie's Code of 1928, county governing bodies may issue interest-bearing warrants, not general obligations of the county, payable, in not exceeding ten years, from the county's anticipated receipts of State Excise Tax on gasoline, to pay valid outstanding claims incurred in the year 1938, on account of the construction and maintenance of public roads and bridges.

It will be seen from the above that the State Highway Department had authority to contract with the counties in the construction, repair and maintenance of public roads and bridges. The counties have authority to issue interest-bearing warrants, not exceeding ten years, from the counties' anticipated receipts of the gasoline tax under Section 1397(110) of Michie's Code of 1928 and Acts 1936, page 28. Reading these pertinent statutes in pari materia, it follows that the State Highway Department can contract with the counties on a term payment basis. Therefore, in my opinion, the State Highway Department, through the State Highway Director, has authority to accept warrants for the indebtedness created by such contracts.

Your second inquiry presents the question as to the right to negotiate the warrants in question (1) to private investors or (2) to the Alabama State Bridge Corporation. For convenience, this inquiry will be treated as two separate inquiries.

Section 6 of the Highway Act of 1927, as amended by General Acts 1935, page 773, and appearing as Section 1397(7) of the 1936 Supplement to Michie's Code of 1928, provides in pertinent part as follows:

> "The State highway commission shall consider and determine all questions relating to the general policy of the State highway department and the conduct of its work and in the performance of its duties. * * *"

The power given above is, in my judgment, sufficiently broad to authorize the negotiation of the warrants in question, provided such be to the best interest of the Highway Department and also a good and sound business policy. This is an implied or incidental power or authority which is necessary to the exercise of expressed powers. The right of the Highway Commission to accept the warrants carries with it the implied power to negotiate them. See 31 C. J. 392; 4 Words & Phrases (3rd Series) 90; In re Board of Commissioners of Cook County, 146 Minn. 103, 177 N. W. 1013.

It therefore follows that the first part of your second inquiry should be answered in the affirmative, subject to the limitations above set out.

The second part of your second inquiry presents the question as to the authority of the Alabama State Highway Corporation to accept the warrants in question in a negotiation with the Highway Department.

The Alabama State Highway Corporation was organized under the authority of Act No. 39, H. 187, approved February 21, 1939. Section 16 of said Act provides as follows:

> "Section 16. Said corporation, when formed, may make such contracts or agreements with the State Highway Department of Alabama as may be necessary to carry out the purpose of this Act; and it may turn over to the State Highway Department any and all funds of this corporation from time to time as may be necessary or proper for the most economical construction of such roads and to comply with all Federal or other Legislation relating to State Highway Department, Federal Aid Roads or other Federal monies. The Securities issued by said corporation shall be signed by the President, attested by the Secretary selected by said corporation and shall be countersigned by the Secretary of the State of Alabama, who shall affix to such instruments the official seal of the State of Alabama."

The above, in my judgment, is sufficient authority for the Alabama State Highway Corporation to accept the warrants in question in a negotiation with the Highway Department, subject to the authority of the Highway Department to make the negotiation as above set forth, and further subject to the limitation that such negotiation be to the best interest of the Alabama State Highway Corporation and also a good and sound business policy.

It, therefore, follows that the second part of your first inquiry should be answered in the affirmative subject to the limitation above set out.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 12, 1939.

Hon. John M. Graham,
Tax Assessor, Jackson County,
Scottsboro, Alabama.

Taxes—

After an assessment of real property, which does not include the improvements, has been made final, the improvements not assessable as an escape.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion under date of April 13 1939, which is as follows:

"Please give me an opinion on an assessment made as listed below:

"A man buys a lot, assesses it for several years during which time he erects a nice office building or dweling on it. Each fall he describes and values it the same as when vacant, does not give in the building at all. Finally someone reports that this lot has been improved two, three or the number of years since the building was erected.

"Would it be subject to an escape assessment on the building, or how should it be taken care of for the years for which it was not assessed. Understand the lot has been and is properly assessed and all due taxes paid."

In my opinion the building cannot be reassessed as an escape and there is no way to assess the improvements after the close of the tax year. The improvements have not been considered in the assessment, but legally when the lot is assessed this assessment includes the improvements.

State v. Mortgage Bond Co. of New York, 224 Ala. 406, 140 So. 365; Belton Coal & Mining Co. v. Hawkins, 210 Ala. 359, 98 So. 26.

In the case of **State v. Mortgage Bond Company of New York**, supra, Justice Boudlin, in passing on a similar question, said:

"Under the law existing at the time of the passage of the above act, in making returns of real estate, the lands and the improvements thereon must be separately listed.

"This did not constitute the lands and improvements separate items of property, subject to distinct and separate tax liens. Indeed, the same statutes defined real estate as inclusive of all structures which would pass by a conveyance of the land.

* * *

"(2) From these authorities it is unquestioned law that a valid assessment, though irregular and subject to correction through the various agencies set up to secure a fair and full assessment to the end that all taxable property shall bear its share of the public burden, when it becomes final and taxes are paid accordingly, the proceedings are binding on the state as well as upon the property owner, the tax lien is satisfied, the abstractor may so regard it.

"The property, and no part of it, can be regarded as an escape, or the property be reassessed as an escape.

* * *

"While omission of improvements as one of the elements of value, and an assessment as unimproved lands, means a failure to assess the property with its just share of the public burden, just as in all other cases of under-valuation, the machinery set up is intended to prevent such result, and, when the record is fully made up, it imports verity.

* * *

"What we have written negatives such assumption. The property as a whole has been assessed, and the tax lien satisfied as to improvements as well as the lands."

After the State has once proceeded by its duly constituted agencies to the assessment and valuation of property, the determination is judicial in its nature, and conclusive in its result, unless impeached for fraud or want of jurisdiction, or revised or set aside by some tribunal having authority to review.

37 Cyc. 1071;

State v. Butler, 227 Ala. 212, 149 So. 101;

Union Central Life Ins. Co. v. Whetstone, 226 Ala. 420, 147 So. 187; Anniston City Land Co. v. State, 185 Ala. 482, 487, 64 So. 110, 111; State v. Doster-Northington Drug Co., 196 Ala. 447, 71 So. 427;

Bower, Tax Collector, v. American Lumber & Export Co., 195 Ala. 572, 71 So. 100;

State ex rel. Davis v. Crane Co., 18 Ala. App. 194, 89 So. 901;

State Tax Commission v. Bailey & Howard, 179 Ala. 620, 60 So. 913.

The assessment of property by the taxpayer is merely the first step in the process of raising revenue by taxation and it is the duty of the taxing authorities to set up the proper machinery to the end that each taxpayer may assume his proper share of the public burden.

I am constrained to hold on authority of **State v. Mortgage Bond Co. of New York**, supra, that there is no fraud in this assessment.

If you discover before the assessment is made final that no improvements are included in the assessment, you can reopen the same and include the improvements.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 12, 1939.

Hon. Chris J. Sherlock,
State Highway Director,
Highway Department,
State Capitol.

Highway Department—The Highway Department has the right to order the Alabama Power Company to remove its utility poles from a state highway right of way where the Highway Department finds that a menace to the traveling public would exist if the poles were not removed.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated April 21, 1939, which is as follows:

"Re: Removal of utility poles from right-of-way of State Highway.

"This Department, in the reconstruction of the Birmingham-Montgomery Highway, has reached a section of the road in Chilton County on which there will not be room for the location of utility poles on the right-of-way due to the improvements that are now underway. On one side of the road utility lines will be permitted to remain, but on the other side of the road the Alabama Power Company's poles will have to be removed; and there will not be room on this side of the highway for the poles or on the other. The right-of-way of the State Highway and the railroad have a common right-of-way line on the side on which the Alabama Power Company's poles are located and, therefore, it is impossible to secure additional right-of-way on this side of the road.

"Please advise if the Department has the right to force the Alabama Power Company to remove its poles from the right-of-way of the State Highway due to the fact that there is not sufficient room for them to be located on the Highway without being a hazard to the traveling public. Please give this matter your prompt attention, as this Department is in urgent need of this information as the project is being temporarily held up at this particular point until we secure this information from you."

I answer your inquiry in the affirmative.

The right of the Alabama Power Company to maintain its utility poles along this particular right of way of the State highway is a legal right. **Crawford v. Alabama Power Company,** 221 Ala. 236, 128 So. 454. The use of the public highway by the power company for the distribution of its electric current for heat, light and power among the inhabitants of this particular territory to be served is a public use. **State of Washington, ex rel., etc. Superior Court,** 142 Wash. 270, 253 P. 115, 58 A. L. R. 779; **Mt. Vernon Woodberry Cotton, etc. Co. v. Alabama Interstate Power Co.,** 220 Ala. 620, 127 So. 206; **Crawford v. Alabama Power Company, supra,** It is provided, however, by Section 1397(121) Michie's Code of Alabama, 1928 that the State Highway Department has the right to prescribe all reasonable rules and regulations as to the construction, repair or maintenance of the poles, wires and lines of such power companies so as to insure the safety of the public in using the roads and highways in the State. The pertinent part of Section 1397 (121) Code, supra, is as follows:

"The department shall have the power to enter into contracts and agreements with the owners or operators of telegraph or telephone lines or power transmission lines which are constructed or operated along or across the public roads, bridges and highways of this State and to prescribe all reasonable rules and regulations as to the construction repair or maintenance of the poles wires and lines of such telegraph, telephone and power companies so as to insure the safety of the public in using the roads, bridges and highways in this State."

From the foregoing it is seen that the Power Company is exercising a legal right by maintaining its utility poles along this right of way of the highway department. This right of the Power Company is subject, however, to any reasonable rules and regulations in so maintaining the same which may be prescribed by the State Highway Department to insure the safety of the public in using this portion of the highway. The question now arises whether the State Highway Department in the exercise of its power and authority over public roads has the right to force the Power Company to remove its utility poles entirely off of the particular portion of the State highway right of way in question if it deems such action necessary to insure the safety of the public.

In the case of **County Court of Wyoming County v. Guy White et al.**, L.R.A. 1917 D. at page 662 the court in speaking to this question said:

> "The right of the public in the highway for the purpose of travel in the ordinary modes is a primary and fundamental right, and is not limited to that portion only of the right of way heretofore travelled. Respondents (telegraph company) have a permissive and subordinate right only, which exists only so long as it does not interfere with the primary and superior right of the traveling public. Such primary right to occupy any and all parts of the right of way for the purposes of a roadway necessarily implies the right to widen and improve the traveled portion of the road, whenever it becomes necessary for the better accommodation of the public."

Our Supreme Court, in the case of **Town of New Decatur v. American Telephone & Telegraph Co.** 176 Ala. 561, 58 So. 613, in speaking through Mr. Justice Sayre, said:

> "But the police power is paramount, and, if its integrity as an inalienable power of government is to be preserved, I cannot see why the use of the streets by public utilities, though once granted, and though the grant was proper at the time, may not be denied altogether whenever conditions are so changed by crowding populations that such extreme alternative becomes necessary to preserve for all the people those uses to which the streets were primarily dedicated."

also,

> "And grant of privileges upon lands dedicated to a particular public use is necessarily subject and subordinate to the rights and necessities of the public, and may always be revoked and terminated whenever required by the needs of the public in the use of it for the purpose for which it was dedicated. This is an implied condition of every such grant, for there can be no irrevocable license as against the rights of the public to the full enjoyment of its easement in the property."

As a general rule of law the following statement is found in 18 Am. Jur. page 422, Section 19:

> "Removal of poles and wires may be compelled when the company has failed to comply with conditions attached to a grant of the use of the streets, **or where the poles and wires have become a menace to the traveling public although they were safe when first erected.**" (Citing Stern v. International R. Co. 220 N. Y. 284, 115 N. E. 759, 2 A.L.R. 487)

It will be seen that although the Power Company has a legal right to maintain its utility poles along this State highway right of way, still the said company is subject to reasonable rules and regulations prescribed by the State Highway Department. From the foregoing authorities it is my judgment that if the State Highway Department finds that a menace to the traveling public would exist if these poles were not removed from the State highway right of way, then under the police powers granted the State and its agencies and institutions the Highway Department can order that the poles be removed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 15, 1939.

Hon. Chris J. Sherlock,
State Highway Director,
Capitol.

State Highway Department—Contracts—Public Utilities—

The State Highway Department has authority to enter into contracts with Public Utility Companies for the purpose of acquiring rights of way for highway purposes.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of March 21, 1939, which is as follows:

"Under Section 167, page 394 of 1927 General Acts of Alabama, the right to construct telegraph and telephone lines along the margin of highways is permitted. Section 19, page 354 of the 1927 General Acts of Alabama authorizes this Department to make agreements and rules regulating use of highways for pole lines.

"In several instances throughout the State, this Department in its improvement program has found the Alabama Power Company owns its own right of way and this privately owned right of way is needed by this Department. The Alabama Power offers to give this Department this privately owned right of way if this Department will enter a contract by which this Department will agree to pay the cost of moving the poles to the margin of the right of way and pay for any subsequent moves made necessary by this Department. In other words, while on its private right of way the Alabama Power Company would not have to move and in giving this right of way to this Department wishes to have the type of agreement as set

forth above so that any moves made necessary while on the State right of way would be paid for by this Department.

"Please advise if this Department has the right to make and enter this type of agreement. This information is needed on projects now under way and an opinion at your earliest convenience is requested."

Under date of April 29, 1939, you sent to this office copy of the proposed agreement to be entered into by and between Alabama Power Company and the State Highway Department, which said agreement is the one referred to in the above request for official opinion of this office. For your information, this agreement has been revised by the writer and a representative of the Alabama Power Company. I attach hereto and make a part of this opinion the agreement as revised and it is now in final form.

I call your attention to Code Section 1397 (33) of the 1923 Code of Alabama, which reads as follows:

"1397 (33). Right of way for roads; how acquired.—The right of way deemed necessary by the State Highway Department for a road or bridge constructed under the provisions of this article shall be acquired by the county in which such road is to be located, without expense to the state. Should the county fail or refuse to acquire the necessary right of way, the state through the State Highway Department shall have authority at the expense of the county to acquire such right of way, either by purchase or by the exercise of eminent domain in condemnation proceedings, as is provided for under the laws of this State."

Under the provisions of this section, the several counties of the State are vested with the right to acquire rights of way for the State Highway Department to be used in constructing roads and bridges within the State. It will be noted that this section also gives the State Highway Department, in cases where the counties fail or refuse to acquire right of way, the right to acquire such right of way at the expense of the county, either by purchase or the exercise of eminent domain in condemnation proceedings. It will further be noted from this section that there is absolutely no restriction placed on the county as to how the right of way is to be acquired. On the contrary, the counties are given a free hand in acquiring these rights of way, and may do it in any manner which they see fit. The counties may either purchase the rights of way, or they may obtain them under their right of eminent domain in condemnation proceedings.

In the event it should become necessary for any of the counties, or the State Highway Department, in case of the failure of the county so to do, to acquire for highway purposes any portion of the private right of way now owned by the Alabama Power Company, by condemnation proceedings or by purchase, it is certain that Alabama Power Company would be entitled to a just compensation for that portion of their right of way so taken. The just compensation to which Alabama Power Company would be entitled should be determined on equitable principles, and should be such as to put Alabama Power Company in as good condition pecuniarily as it would have been if the property had not been taken. **United States v. Town of Mahant**, 153 Fed. 520; **Olson v. United States**; 229 U. S. 246; **Chicago-Burlington & Quincy R. R. Co. v. Chicago**, 166 U. S. 226.

The counties, or the State Highway Department, in cases of the counties' failing or refusing to obtain the right of way, in my opinion could do by law just what this proposed agreement provides. In other words, the Highway Department and the several counties will be doing nothing more by entering into this contract than could be done under the provisions of Section 1397 (33), supra,—that is, the acquiring of rights of way for highway purposes. By entering into this contract, the same ends will be obtained by a different means or mode of procedure.

It is, therefore, my opinion that the State Highway Department could enter into the agreement attached hereto with Alabama Power Company.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 15, 1939.

Hon. C. W. Gantt,
Register, Circuit Court,
Elmore County,
Wetumpka, Alabama.

Circuit Court—Trial Tax—

Any petitions filed in furtherance of the administration of an estate pending in a court of equity are ancillary to the principal procceeding and are not subject the trial tax imposed by Section 9 of Act No. 194, page 263, General Acts 1935.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated February 16, 1939, which reads as follows:

"Please furnish me an opinion on the following legal question: When an estate of a deceased person is pending in the Circuit Court in Equity and during the course of administration the administrator from time to time files a petition in connection with the administration, such as a petition for authority to compromise doubtful claims or a petition to ratify contracts or transactions made by the administrator, should the Register collect a trial tax on each separate proceeding or is the one trial tax charged in the general administration cause sufficient?

"There is a case now pending in the Circuit Court in Equity of Elmore County, Alabama, where this question is involved. There seems to be some doubt as to whether or not a trial tax should be taxed as part of the cost every time a petition is filed in the general case and in order

that I may know how to enter up the costs I am asking that an opinion be furnished me.

"I shall appreciate an answer as soon as convenient as the question involved is holding up the payment of the costs in a case."

Under the facts as set out in your request, I am of the opinion that the collection of one trial tax in a general administration case would be sufficient.

I call your attention to Section 9 of Act No. 194, page 263 of the General Acts of 1935, which reads in part as follows:

"Section 9. A trial tax of Three Dollars ($3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this state * * * nor shall any trial tax fee be imposed or collected in any ancillary proceedings."

You will note from the above quoted section that all ancillary proceedings are exempt from the trial tax imposed by law.

Ancillary proceedings are defined in 1 Words and Phrases, page 384, to be proceedings which are subordinate or auxiliary to the principal proceeding. In 2 Corpus Juris, page 1336, ancillary proceedings are defined as: "That which aids or promotes a proceeding regarded as the principal, subordinate or auxiliary to the principal."

The administration of an estate in a court of equity and any petitions filed in connection with the administration of the estate, constitute but one case. In other words, any petitions filed in furtherance of the administration of the estate are ancillary to the principal proceeding and are therefore not subject to the trial tax imposed by law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 15, 1939.

Hon. B. P. Singleton,
State Comptroller,
Capitol.

Court of County Commissioners—

The Board of Revenue or Court of County Commissions must allow reasonable expense for post office box rented for Tax Assessor, Tax Collector, Circuit Clerk, Sheriff, Judge of Probate, and, in its discretion, may pay similar expense for County Health Officer.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge receipt of your request for official opinion dated April 4, 1939, which is as follows:

"Please refer to opinion of the Attorney General (Biennial Report 1928-30, page 826) wherein it was held that the County could not pay expenses for Post Office box rent for County officers and opinion of the Attorney General (Quarterly Report Vol. XIII, page 36) wherein it was held that the County could pay for the expense of Post Office box rent for the County Superintendent of Education and, advise me as follows:

"(1) Does the last opinion referred to overrule the opinion first referred to, as to expense of Post Office box rent for the Tax Assessor, Tax Collector, Circuit Clerk, Sheriff, County Health Officer and Judge of Probate?

"(2) If such opinion is not overruled, can the County pay the expense of Post Office box rent for the officers named in question No. 1?"

It is my conclusion that your first inquiry must be answered negatively. The ruling of this office appearing in the Quarterly Reports of the Attorney General Vol. XIII, at page 36, overrules the opinion appearing in the Biennial Reports of the Attorney General 1928-30, at page 826, only in so far as same applies to the County Board of Revenue or Court of County Commissioners providing post office box rent for the County Superintendent of Education. Said opinion was based on a construction of Article 7, Section 169 of the Alabama School Code of 1927, which prescribed that the County Board of Revenue or Court of County Commissioners shall provide necessary furniture, office equipment, stationery, postage, forms and supplies referred by the County Superintendent of Education, in the right of the case of **Underwood Typewriter Company vs. Marengo County Bank,** 203 Ala. 128, 82 So. 158.

In answer to your second inquiry, I wish to refer you to Section 9604, Michie's Code of 1928, which is as follows:

"9604. Stationery of officers paid for by county.—The judge of probate, tax assesor, tax collector, register of the Circuit Court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, **postage stamps** used exclusively for official business, and telephone to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county." (Emphasis ours).

The Supreme Court of Alabama, in the case of **Underwood Typewriter Company v. Marengo County Bank, supra,** held that the term stationery as now used in the above referred to Section 9604 includes typewriters, and the rule as laid down by this office in the aforesaid opinion, Quarterly Report, Attorney General, Vol. XIII, page 36, was that the word postage, being a

charge for transmittal of messages or communications, should be liberally construed to include telegrams and long distance telephone calls. This office ruled further in construing said Section 9604 that the words "postage stamps" as used in said Section include express charges on the theory that the purpose of an allowance for postage stamps was to allow payment by the county to the officers therein named for legitimate expenses incurred in necessary mailing. **Quarterly Report Attorney General,** Vol. XII, page 111.

Since a post office box is incidental to mailing and the transmittal of messages, the expense of same is necessarily an incidental cost of mailing and the transmittal of messages. Therefore, by a liberal construction of the term **postage stamps,** it is my conclusion that the Board of Revenue or Court of County Commissioners must allow reasonable expense for post office box rented by the Tax Assessor, Tax Collector, Circuit Clerk, Sheriff and Judge of Probate.

You will note that there is no mention of allowance of such expenses for the County Health Officers in the above quoted Section 9604, but I wish to call your attention to subsection 12 of Section 1058, Code of Alabama, 1923, as amended by General Acts of Alabama, 1935, page 918, which is as follows:

> "1058 (12) To occupy an office in the courthouse of the county, to be assigned by the court of county commissioners, **or other like board;** and in the event that an office in the courthouse is not available the same court or board may in its discretion provide an office for him conveniently located with reference to the courthouse of the county, to be assigned by the court of county commissioners, or other like board; and in the event that an office in the courthouse is not available the same court or board may in its discretion provide an office for him conveniently located with reference to the courthouse; and **the court of county commissioners, or other like board, may in its discretion appropriate from the revenue of the county such sums as are found necessary to furnish and equip the office of the county health officer with all necessary supplies,** and furnish all necessary clerical help, transportation, and other expenses of the county health officer, and may in its discretion appropriate, from the revenues of the county, money for the prosecution of public health work which has been recommended by the county health officer and endorsed by the county board of health and approved by said court of county commissioners, or other like board." (Emphasis ours).

Said subsection 12 of Section 1058 specifically provides that the Court of County Commissioners, or other like board, may in its discretion appropirate such sums as are necessary to equip the office of the County Health Officer with all necessary supplies. The foundation upon which the opinion of this office appearing in the Quarterly Reports of the Attorney General, Vol. XIII, at page 36, is based is that the word **supplies** as used in Article 7, Section 169 of the Alabama School Code of 1927, page 67, should be liberally construed to permit the office of Superintendent of Education to be supplied with a post office box, and to permit the rent of same to be paid by the Board of Revenue or Court of County Commissioners. Therefore, by a like reasoning, it is my opinion that the word supplies as used in the above referred to subsection 12 of Section 1058 is sufficiently broad to allow the Board of Revenue or Court of County Commissioners, in its discretion, to supply the office of the County Health Officer with a post office box, and to pay the rent for same.

This opinion is in conflict with the above mentioned opinion rendered to the Judge of Probate, Colbert County, Biennial Report of Attorney General, 1928-1930, page 826, and same is hereby overruled and withdrawn.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 15, 1939.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation—

Objections in writing by taxpayer against assessed valuation of his property by the County Board of Equalization may be filed in all counties, including Jefferson, with the Secretary of said Board on or before the last Monday in April.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 12, 1939, in which you request my opinion as follows:

"The Act establishing a Board of Equalization in each of the counties, being House Bill No. 143, approved March 15, 1939, stipulates that all Boards of Review heretofore created or existing shall, on the 30th day after the pasasge and approval of the act, be abolished and for said thirty day period said Boards of Review shall continue to function and to exercise the powers and duties as set out in Article 3 of an act approved July 10, 1935, appearing in the 1935 General Acts, beginning at page 256 (289). This act establishing the Board of Equalization under Section 16 thereof, among other things, provides that taxpayers may file objections in writing to the assessed valuations with the Secretary of the Board on or before the last Monday in April. The 1935 General Act above referred to contains the same time limit in which written protests may be filed. However, the act approved March 21, 1936, appearing in the 1936 General Acts, page 205, which is applicable to Jefferson County, provides that written protest be filed by any property owner to the valuation placed by the Board of Review at any time after the Board of Review fixed the assessed value and before the third Monday in March.

"I desire your opinion as to whether written protests of property owners should be received and filed by me subsequent to the third Monday in March of this year and prior to the last Monday in April."

I am of the opinion that a taxpayer may file objections in writing to the assessed valuation placed upon his property by the County Board of Equalization on or before the last Monday in April in every county in the State of Alabama, including Jefferson County, and that, consequently, your inquiry should be answered in the affirmative.

By the provisions of Section 74 of the 1935 Revenue Act, a taxpayer had until the last Monday in April to file objections in writing to the assessed valuation placed upon his property by the Board of Review. In Section XVI of the so-called County Board of Equalization Act, Act No. 143, General Acts, 1939, approved March 15, 1939, we find an identical provision as to the time within which such objections may be filed by a taxpayer. The provisions of this Act, except as otherwise therein expressly provided, became effective immediately upon its passage and approval (Section XXVI). The act has been examined and Section XVI thereof does not come within the exceptions as to the time of taking effect, and, therefore, became effective on the date of the passage and approval of the Act, to wit, March 15, 1939.

It is true that since October 1, 1936, pursuant to the provisions of Act No. 176, General Acts, 1936, page 205, approved April 21, 1936, and effective October 1, 1936, which is an act applicable only to counties in the State of Alabama having a population of 110,000 or more (Jefferson County being included in said population classification) a taxpayer in Jefferson County had the right to file objections or protests in writing to the assessed valuation placed on his property by the Board of Review before the third Monday in March but did not have such right thereafter, the provisions of said 1936 Act having superseded the provisions of the 1935 Act, supra, in this regard, in the counties in Alabama within the population classification contained in the 1936 Act. (We do not understanding that the operation of said 1936 Act has been suspended in Jefferson County since the date upon which it became effective, as it could have been done pursuant to the provisions of Section 10 thereof.)

However, it is my opinion that the provisions of the so-called County Board of Equalization Act, hereinabove referred to, in regard to the time of filing such protests superseded the provisions of the said 1936 Act in that regard as of the date of the passage and approval of said Act. By Section XXV of said 1939 Act, all laws and parts of laws in conflict therewith are repealed.

While it is a general rule of statutory construction that the presumption is that a general act does not repeal a local statute (or a general statute with local application such as the 1936 Act here under consideration), yet such presumption must give way to a plain manifestation of a legislative intent to create throughout the State of Alabama a uniform system on the subject of such legislation. This principle of law is well stated by Mr. Justice Gardner for the Supreme Court of Alabama in the following language taken from his opinion for the court in the case of **Shepherd et al v. Clements**, 224 Ala. 1:

> "We recognize the rule that the presumption is a general act does not repeal a local statute, but, as has been well said, 'such presumption must give way to a plain manifestation of a different legislative intent.' The question is one of intention which may be made to appear by the subject-matter with which the general act is concerned, by the surround-

ing circumstances, by other legislation on the same subject, and the purpose to be accomplished. Thus, where the clear general intent of the Legislature is to establish a uniform system throughout the state, the presumption must be that local acts are intended to be repealed. 36 Cyc. 1089, 1090."

That the Legislature intended by the passage of the so-called County Board of Equalization Act to establish a uniform system throughout the State of Alabama on the subject therein dealt with admits of no doubt, and, consequently, it is my opinion that said act repeals the 1936 general act with local application, supra, insofar as the same conflicts therewith. The conflict between the two acts in regard to the time within which a taxpayer may file his objections or protests in writing to the assessed valuation placed upon his property by the Board of Review (Board of Equalization) has already been pointed out hereinabove.

Therefore, I advise you that Section XVI of the so-called County Board of Equalization Act, which became effective on March 15, 1939, contains the presently applicable statutory law on this subject, that is, the time within which such objections or protests may be filed, to wit, on or before the last Monday in April, in every county in the State of Alabama, including Jefferson County, the provisions of said 1936 general act, with local application, which was applicable in Jefferson County, to the contrary notwithstanding.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 15, 1939.

Hon. John C. Curry, Commissioner,
Department of Revenue,
Capitol.

Taxation—Federal Savings and Loan Associations—

1. Shares owned by Alabama resident in Savings and Loan Associations organized under the laws of the United States and not subject to ad valorem taxes.

2. Shares owned by Alabama resident in Savings and Loan Associations organized under the laws of the United States are not subject to excise or license taxes imposed by Section 337, et seq. of the Revenue Act of 1935, as amended.

3. Dividends from shares of Savings and Loan Associations organized under the laws of the United States are not liable to Alabama Income Tax.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"We have received the following letter from the First Federal Savings and Loan Association of Nashville, Tennessee, with reference to liability of Alabama stockholders of this Association for ad valorem taxes on the shares of the Association and their liability for Alabama Income Tax on dividends received from these shares:

" 'We are having some inquiries as to whether or not accounts in our Association held by residents of Alabama are subject to your foreign securities tax.

" 'I call your attention to the Law passed by Congress under which we operated, same being Section 5, Subsection (h) of the Home Owners' Loan Act of 1933, as amended, which reads as follows:

" ' "Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchises, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar **local,** mutual or cooperative thrift and home financing institutions."

" 'It occurs to me unless your foreign securities tax applies to both mutual or cooperative thrift and home financing institutions such as state chartered Building and Loan Associations, neither shares nor income therefrom in our institution held by an Alabama resident would be subject to the tax mentioned.

" 'Please be kind enough to advise me how your Department is ruling on this question so that I may advise such Alabama residents as have accounts with us. Your early reply will be greatly appreciated.'

"It will be appreciated if you will give us an opinion stating whether or not Alabama residents holding stock in a Foreign Federal Savings and Loan Association would be liable for ad valorem taxes on their shares. Second, whether or not they would be subject to Alabama income tax on the dividends received from such shares."

I am of the opinion that owners of withdrawable shares in Federal savings and Loan Associations are not liable for ad valorem tax thereon.

Section 5, Subsection (h) of the Home Owners' Loan Act of 1933, as amended, the act under which Federal Savings and Loan Associations operate, is as follows:

"Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

Pretermitting any consideration of the cited section of the Home Owners' Loan Act of 1933, as amended, enacted by the Congress nevertheless the shares in said association are exempt from ad valorem taxation under the laws of Alabama.

By Act No. 159, S. 116, approved April 9, 1931, General Acts 1931, page 218, it is provided:

"Section 1. BUILDING AND LOAN DEFINED. A building and loan association, as contemplated or provided by this Act, is any association or corporation, heretofore or hereafter formed, created or organized, which is chartered under any building and loan law to carry on the business of a building and loan association and is formed to encourage industry, thrift, home building and saving among its shareholders or members; the accumulation of savings, the loaning to its shareholders and members of the funds so accumulated to assist its members to buy real property and to erect homes or other improvements thereon and to pay off existing encumbrances thereon. The word 'Association' when used in this Act shall refer to a building and loan association. the word 'Commissioner' when used in this Act shall refer to the Building and Loan Commissioner. The word 'Board' shall refer to the Building and Loan Board. The word 'Member' shall include any shareholder of any type whatsoever in a building and loan association."

By Section 31, Subsection 8 thereof, it is provided:

"(8) No shares nor funds of any association that are subject to withdrawal shall be subject to taxation."

Section 31, Subsection 11 provides:

"(11) The non-withdrawable or permanent shares of building and loan associations shall be subject to taxation on the same basis, and in the same manner as stock of other domestic corporations."

Federal Savings and Loan Associations are such organizations as the Alabama statute, supra, undertakes to deal with. It does not differentiate between those organized under the laws of Alabama and those organized under the laws of the United States.

I am assuming from your inquiry that the shares owned by residents of Alabama, to which you refer, are "withdrawable" shares. In such case they are exempt from ad valorem taxation in Alabama. Of course, if the shares

are permanent or non-withdrawable, they are liable to ad valorem taxation under the quoted excerpt from the Federal statute, supra, in the same manner as shares of any domestic corporation.

Upon the same assumption, the dividends from such withdrawable shares would not be taxable under the Income Tax Laws of Alabama, nor under the registration tax levied by Section 337, et seq. of the Revenue Act of 1935 as amended by Acts 1936-37, page 105.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 15, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Registers in Equity—Liability for deposit of fiduciary funds—

Register in Equity not liable for loss of fiduciary funds which he deposits in a bank pursuant to the orders of the court.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of March 31, 1939, in which you request my opinion as follows:

"Mr. Theo Turt, Register in Chancery, Perry County, was in possession, as Custodian, of certain Fiduciary Funds in 1933, when the bank in which he had such funds deposited failed. He had placed these funds in this bank by direction of the Circuit Court of his District and he is now of the opinion, that inasmuch as he was directed by order of the Court to place the money in the bank, neither he nor his bond are liable for the restoration of it.

"I am attaching hereto the two Court orders referred to above and would appreciate your advising me as to whether or not he is correct in his contention that on account of having acted under and by direction of the Court, he is not personally or on his bond liable for the restoration thereof."

It appears from the two court orders attached to your request, the one dated May 10, 1929, and signed by the Hon. Thomas E. Knight, as Judge of the Fourth Judicial Circuit, and the other dated March 17, 1932, and signed by the Hon. John Miller, as Judge of the fourth Judicial Circuit, that the

Register was directed by said court orders to deposit the specific fiduciary funds in his hands in designated banks at interest. The last order provides:

"J. Marvin Moore et al
v.
Jane Belcher Eiland et al

} In Circuit Court of Perry County, in Equity.

"This cause coming on to be heard, was submitted on report of Register.

"It is ordered, adjudged and decreed by the court that said report be and the same is hereby confirmed and ratified, and the Register of this court is hereby directed to place the money in his hands on savings in Marion Central Bank of Marion, Ala.

"This March 2, 1932.

Jno. Miller, Judge."

In my opinion, the Register is not liable for executing the orders of the court by depositing moneys in his hands, as agent of the court, in the manner directed by the court, although the bank in which he is ordered to deposit the said funds later suspends payment.

The Supreme Court recently spoke to this question in the case of **Shelley v. Thomas,** 232 Ala. 227, 167 So. 316. There trust funds were in the hands of the Register for investment in order to pay annuities provided by will. The court ordered the Register to invest the same in the preferred stock of Realty Mortgage Company, a corporation. The annuitant excepted to the order of the court and appealed therefrom. In disposing of the question, the court said:

"It is earnestly insisted that the register, in investing the funds in the preferred stock of the Realty Mortgage Company, did so in disregard of the provisions of section 74 of the Constitution and of section 10413 of the Code of Alabama, and was not made in good faith or in accordance with the terms of the decree authorizing the investment.

"The appellant's argument rather proceeds upon the theory that the appellee was a trustee of the funds, and, being such trustee, was bound to observe the mandatory inhibitions of section 74 of the Constitution against investments of any trust funds by executors, administrators, guardians, or other trustees in bonds or stock of any private corporation; and was likewise bound to observe the mandate of section 10413 of the Code; that, inasmuch as the register made the investment of the funds in stock of a private corporation, in disregard of both section 74 of the Constitution and of section 10413 of the Code, she acted at her peril, and must be held liable for the funds.

"The appellant's argument is, as we see it, faulty in assuming that the appellee in making the investment was acting as a trustee of the funds.

Her relation to those funds was not that of a trustee, but rather that of of an agent of the court, and as such agent was subject to the direction of the court. 21 Corpus Juris, 751, p. 603. He is, as a matter of course, liable for money coming into his hands as register, but only as an agent of the court, and not as trustee.

* * * *

"While the register is liable for all moneys coming into his hands, yet he is a mere agent of the court, and as such agent he holds the money for the court, and is answerable for any loss of the money by his wrongful acts, but, being an agent of the court, he must disburse the money as the court, his master, directs, and in doing so assumes no personal liability. 21 Corpus Juris, Section 751, p. 603; People v. Randall, 73 N. Y. 416; Johnson v. Fleming, 116 Ky. 680, 50 S. W. 855. In fact, if he should refuse to comply with the orders of the court in making distribution of the fund, he could be held for contempt, and punished accordingly. 11 Corpus Juris, Clerks of Court, p. 884.

"This being true, it would be an absurdity to hold him personally liable for complying with the orders of the court, however improvident the orders under which he acted may have been."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 15, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Probate Judges—

Under Section 401 of the Code of Alabama, 1923, the Probate Judge must make an alphabetical list by precincts of the persons who have registered in his county during that year, as shown by the list furnished him by the Board of Registrars, a copy of which alphabetical list he must certify to the Secretary of State, and under Section 7285 of the Code of Alabama, 1923, he is entitled to 2½c per name for each name appearing on said list, which are only the names of the newly registered electors and not the names of all the registered electors of the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 11, 1939, in which you request my opinion as follows:.

"Please refer to Section 401, Code of 1923; same being Section 1566, Code of 1896, and Section 318, Code of 1907, as amended by Acts of 1903, page 438, and Acts of 1920, page 124, opinion of the Attorney General (Report of 1922-24, page 461) and opinion of Attorney General under date of February 1st, 1939, to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, relative to list of registered electors, and advise me as follows:

"1. Does Section 401 refer only to the newly registered electors, registered by the Board of Registrars, and certified to the Judge of Probate?

"2. Should the Judge of Probate certify to the Secretary of State only a list of the electors registered by the Board of Registrars during the preceding year?

"3. If your answer to question No. 2 is in the affirmative, would the Judge of Probate be entitled to 2½c per name and would the opinion to Hon. G. H. Howard be overruled and modified in so far as same conflicts?"

In effect, you ask that we reconsider the opinion of this office rendered to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of February 1, 1939, insofar as said opinion holds that the Probate Judge should, in compliance with the provisions of Section 401 of the Code of Alabama, 1923, make each year an alphabetical list by precincts of all the registered electors in the county, a copy of which he must certify to the Secretary of State, and that he is entitled to 2½c per name, as provided by Section 7285 of the Code of Alabama, 1923, for each name appearing on such list.

Upon more mature and careful reflection and reconsideration of this question, we are convinced that the holding of that opinion to Judge Howard to the effect that the Probate Judge must prepare annually an alphabetical list by precincts of all the registered electors in the county, a copy of which he must certify to the Secretary of State, is laid in error and it is, therefore, hereby modified to conform to the holding of this opinion on that question.

Prior to the adoption of the Constitution of 1901, the statutory law on this subject was contained in Section 1566 of the Code of Alabama, 1896, which reads as follows:

"The precinct registrar shall, within two weeks after the expiration of the time prescribed for registration, make a true copy of the list of names registered, which copy, along with the original registration list, he must return to the office of the Judge of Probate of the County."

You will note that said section did not require the Judge of Probate to make an alphabetical list by precincts of such names, annually, or at any other time, and did not require that he certify a copy of such list to the Secretary of State.

In 1901, this subject was dealt with in the Constitution of Alabama adopted in that year. Section 187 of that document reads as follows:

"187. The board of registrars in each county shall, on or before the first day of February, nineteen hundred and three, or as soon thereafter as practicable, file in the office of the judge of probate in their county, a

complete list sworn to by them of all persons registered in their county, showing the age of such persons so registered, with the precinct or ward in which each of such persons resides set opposite the name of such persons, and shall also file a like list in the office of the secretary of state. The judge of probate shall, on or before the first day of March, nineteen hundred and three, or as soon thereafter as practicable, cause to be made from such list in duplicate, in the books furnished by the secretary of state, an alphabetical list by precincts of the persons shown by the list of the registrars to have been registered in the county, and shall file one of such alphabetical lists in the office of the secretary of state; for which services by the judges of probate compensation shall be provided by the legislature. The judges of probate shall keep both the original list filed by the registrars and the alphabetical list made therefrom as records in the office of the judge of probate of the county. Unless he shall become disqualified under the provisions of this article, any one who shall register prior to the first day of January, nineteen hundred and three, shall remain an elector during life, and shall not be required to register again unless he changes his residence, in which event he may register again on production of his certificate. The certificate of the registrars or of the judge of probate or of the secretary of state shall be sufficient evidence to establish the fact of such life registration. Such certificate shall be issued free of charge to the elector, and the legislature shall provide by law for the renewal of such certificate when lost, mutilated, or destroyed."

You will note from a reading of that section that the Board of Registrars was required within a stated period of time to certify to the Probate Judge a list of all the persons registered in their county and that the Probate Judge was required within a stated period of time thereafter to make, in duplicate, in books furnished by the Secretary of State, an alphabetical list by precincts of such registered electors, one copy of which he was required to file in the office of the Secretary of State, and that the Legislature was required to provide compensation for such services to the Judges of Probate.

By Section 12 of Act No. 480 (General Acts, 1903, p. 438) approved October 9, 1903, the Legislature provided certain statutory requirements as to persons registered each year which were very similar to and almost identical with the requirements contained in Section 187 of the Constitution. Said section reads as follows:

"Sec. 12.—The board of registrars shall each year, within two weeks after the expiration of the time prescribed for registration make a true copy of the list of names registered stating the residence of the person registered by precinct—if not in an incorporated city or town or by wards if in an incorporated city or town, which copy along with the registration list, must be returned to the office of the Judge of Probate of the county. The Judge of Probate shall certify an alphabetical list to the Secretary of State. The Judge of Probate shall keep both the original list filed by the registrars and the alphabetical list made therefrom as records in the office of the Judge of Probate of the county, and same shall be open to public inspection."

This section was incorporated in the Code of Alabama, 1907, as Section 318 thereof.

By Section 35½ of Act No. 78 (General Acts, 1920, p. 124) approved October 2, 1920, the statutory provisions in this regard were changed slightly. Said section reads as follows:

"Section 35½. List of Names Registered by Precincts.—The board of registrars shall each year, within two weeks after the expiration of the time prescribed for registration, make a copy of the list of names registered, stating the residence, color and sex of the person registered by precincts—if not in an incorporated city or town, or by ward if an incorporated city or town—which copy, along with the registration list, must be returned to the office of the judge of probate of the county. The julge of probate shall certify an alphabetical list to the Secretary of State. The judge of probate shall keep both the original list filed by the registrars and the alphabetical list made therefrom as recorded in the office of the judge of probate of the county, and shall be open to public inspection."

This section was incorporated in the Code of Alabama, 1923, as Section 401 thereof and has remained the statutory law of this state on this subject since that time.

In compliance with the constitutional mandate so to do contained in Section 187, supra, the Legislature of Alabama by Section 14 of the 1903 Act, supra, provided compensation for the Probate Judges for performing the services required by Section 187 in the following language:

"Every Judge of Probate shall be paid for his services about the registration and certification of electors, 2½c for each elector registered and certified."

This was incorporated in the Code of Alabama, 1907, in the following language as a part of Section 3720 thereof (which is the section dealing with the fees of Judges of Probate):

"For preparing list of registered voters as required by Section 187 of the Constitution, 2½c a copy for each voter enrolled to be paid by the county commissioners in each county."

This same proviso was carried forward into the Code of Alabama of 1923 as a part of Section 7285 thereof (which is the section of that code dealing with the fees of Judges of Probate) and remains the statutory law of this State on this subject to date.

These constitutional and statutory provisions received construction by the office of the Attorney General in an opinion to Hon. E. J. Garrison, Judge of Probate, Ashland, Alabama, under date of September 25, 1924 (Biennial Report of Attorney General, 1922-24, page 461) wherein it was held that the Judge of Probate was entitled to 2½c a name for each name appearing on the alphabetical list by precincts of the registered electors which he was required to make annually, a copy of which he was required to certify to the Secretary of State.

This holding was reaffirmed in an opinion of this office to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of August 23, 1937 (Biennial Report of Attorney General, 1936-38, p. 358).

When all of these constitutional and statutory provisions are considered in connection with the purposes obviously intended to be accomplished thereby, that is, to provide a complete record in each county of all persons registered

as electors in that county, and in the office of the Secretary of State of all persons registered as electors in this State, it seems very clear that our constitution makers, by the provisions of Section 187, supra, intended that an alphabetical list of all registered electors as of that time be prepared by the Judge of Probate in each county, a certified copy of which was required to be furnished to the Secretary of State, and that it was the intention of our legislators to require that this alphabetical list by precincts of registered electors be kept up to date. All that was required to keep this list up to date in the office of the Judge of Probate of the various counties and in the office of the Secretary of State was for the Judges of Probate to prepare annually an alphabetical list by precincts of the persons who had registered in their counties that year, one copy of which was to be kept in the office of the Judge of Probate and another copy of which was to be certified to the Secretary of State. That this is all that the Legislature required is reflected by the provisions of Section 12 of the 1903 Act, supra, Section 318 of the Code of 1907, supra, Section 35½ of the 1920 Act, supra, and Section 401 of the Code of Alabama, 1923, supra, wherein, immediately after the provision contained in each of said sections requiring the Board of Registrars each year to furnish a list of the names of persons so registered by precincts to the Judge of Probate, is the requirement that the Judge of Probate shall certify an alphabetical list to the Secretary of State and shall keep both the original list filed by the registrars and the alphabetical list made **therefrom** in his office. It is obvious that the alphabetical list which the Judge of Probate is required to make annually, a copy of which he must furnish to the Secretary of State, is an alphabetical list only of those persons whom the registrars report to him by precincts as having registered during that year.

The premises considered, we advise you that the alphabetical list by precincts of the registered electors which the Judge of Probate is required to make annually, a copy of which he must certify to the Secretary of State, should contain only the names of those persons who have been reported to him by the registrars as having registered during that year, and that it should not contain the names of all the other registered electors of the county whose names have previously been included in these alphabetical lists made by him, copies of which were certified to the Secretary of State.

We reaffirm the holding of our opinion to Judge Howard and the earlier opinions of this office hereinabove cited to the effect that the Judge of Probate is entitled to 2½c per name as provided by Section 7285, the pertinent provision of which is quoted above, for each name appearing on such alphabetical list of registered electors which he is required to make annually, a copy of which he must certify to the Secretary of State. If the holding of the opinions of this office to that effect need any further support, it is found by a reading of the language of Section 14 of the 1903 Act, supra, which is contained in the same act with Section 12 of the 1903 Act, supra. This very clearly shows that this 2½c fee is provided for all names appearing on these alphabetical lists which the Judge of Probate is required to make annually, (that is, the names of the persons reported to him as having been registered during that year), a certified copy of which must be furnished to the Secretary of State, by the above-quoted statutory provisions, as well as for the making of the original list of all the registered electors in his county as of that time which he was required to make by Section 187 of the Constitution, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 15, 1939.

Hon. E. W. Pettus, President
County Board of Education,
Dallas County,
Selma, Alabama.

Board of Equalization—Schools—

Membership on the City School Board of Selma or the Board of Trustees of Dallas Academy under facts stated would not disqualify a person from serving on the Board of Equalization.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 3, 1939, in which you request my opinion as follows:

"We would like to know whether the membership on the City School Board of Selma or the Board of Trustees of Dallas Academy will disqualify a person from serving on the Board of Equalization."

In answer to your inquiry, I am of the opinion that under facts stated neither membership on the City School Board of Selma or the Board of Trustees of Dallas Academy would disqualify a person from serving on the Board of Equalization. In your letter of April 11, 1939, you state:

"Under Special Acts of the Legislature the Board of Trustees of Dallas Academy was incorporated, and another corporation was created by the Legislature known as the City School Board of Selma. These two corporations have the management of the Public Schools in the City of Selma and the same powers as city boards of education. They are not elected by the people and both of them are self-perpetuating bodies. When a member dies or resigns the remaining trustees elect a successor. They are excepted from general laws relating to schools where in conflict, and the trustees and members of the City School Board receive no compensation."

The Dallas Academy was incorporated under Acts 1845, p. 120. The City Board of Education was incorporated under Acts 1890-91, p. 150. Both are self-perpetuating bodies. The Dallas Academy became part of the public school system in 1913 (Owens' History of Alabama).

Section 6 of Act No. 143, S. B. 14, approved March 15, 1939, which created Boards of Equalization, provides as follows:

"Section VI. No member of any County Board of Equalization shall hold employment or office of profit with the United States, the State of Alabama, any County or other political subdivision or said State, or with any Board, department or other agency of the United States, of the State of Alabama, of any County or other political subdivision of said State

or with any County School Board or with any municipality, while holding office as a member of said Board."

From the statement in your letter of April 11th, it does not appear that a member of the City School Board of Selma or the Board of Trustees of Dallas Academy holds an employment or office of profit within the purview of Section 6, supra. These members receive no compensation and do not hold employment. They merely hold non-profit offices. Therefore, under facts stated, it follows that the prohibition in Section 6, supra, is not applicable to members of the City School Board of Selma or to the Board of Trustees of Dallas Academy.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. S. L. Johnson,
Register, Circuit Court, in Equity,
Calhoun County,
Anniston, Alabama.

Intoxicating liquors—Nuisances—Padlock proceedings—Supersedeas on appeal.

The provisions of law relating to supersedeas bonds to stay judgment pending appeal are not applicable to decrees of Circuit Court ordering padlock of premises in the maintenance of liquor nuisances.

Register in Equity has no authority to enter order fixing the amount of bond to be executed by owners or lessees of property padlocked as liquor nuisances, in order to effect return of possession thereof to owners or lessees pending final determination of cause.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of February 20, 1939, in which you request my opinion as follows:

"I desire to obtain an opinion from you on the question as to whether when an order is made by the Circuit Judge padlocking a place as a liquor nuisance the right of supersedeas exists in favor of the party or parties against whom the proceeding has been prosecuted.

"Section 8980 gives the right of appeal in mandamus or other supervisory writ of a remedial nature within thirty days after the final judgment is rendered, it being provided that the case shall be a preferred one

in the Supreme Court and shall be decided at the first term to which it is taken.

"The Register is authorized by law to fix the amount of supersedeas bond, and it also becomes the duty of the Register to approve the bond when the amount thereof shall have been fixed by either the Judge or himself.

"The question has arisen here as to whether the right of supersedeas exists in these liquor nuisance cases, and I will thank you to favor me with an opinion on the subject."

In my opinion, your inquiry must be answered in the negative. Section 8980 of the Code is not applicable to injunctions.

The maintenance of a liquor nuisance involves the commission of offenses against the criminal statutes of the State. It is unthinkable that the Legislature, by the enactment of the provisions of law relative to bonds to supersede judgments pending appeal from the nisi prius court to the court of last resort, intended that the principal in said bond should be permitted to continue unmolested in his violations of the criminal statutes pending the appeal.

However, in cases of padlock proceedings, provisions are made for the return of the possession of real property to the owners or lessees thereof, upon giving security against the use of the same for unlawful purposes. The provisions as to padlock proceedings contained in Sections 9290 et seq. of the Code of 1923 are applicable to padlock proceedings under the provisions of 4671 et seq. of the Code. **Ex parte Harvell,** 235 Ala. 63; **Joiner v. State,** 232 Ala. 522, 168 So. 885; **Ex parte Hill,** 229 Ala. 501, 158 So. 531.

Section 9291 of the Code of 1923 provides for the release of the property, upon execution of bonds to secure against its use for unlawful purposes, pending the **hearing** of the cause, that is to say, in the interim between the filing of the bill of complaint and the Chancellor's final decree thereon. However, Section 9293 allows the execution of such bonds and the release of property **after** final decree. And it is the last cited section which is the authority for the Chancellor to make an order authorizing the release of the property pending the appeal from his final decree.

I doubt not that if the respondents in the padlock proceedings will appear before the court by whose decree the padlock was effected, and present evidence sufficient to reasonably satisfy the court that the property, if returned to the possession of the owners or lessees, will not be used further for purposes of violating the criminal statutes, then the court or the judge will fix the amount of a bond to secure against such violations and, upon its execution by the principal with sufficient surety, will order the return of the possession of the property to said owners or lessees. Section 9293 of Code of 1923.

If such order is made, the same may include a provision that the bond, in the amount fixed, may be approved by the Register. But the Register has no power to make an order authorizing the return of the property upon the execution of such a bond.

It is to be borne in mind that this opinion does not address itself to the questions of the authority of the Supreme Court or of Justices thereof, to allow supersedeas pending appeal.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 16, 1939.

Hon. J. B. Kirby,
Sheriff, Hale County,
Greensboro, Alabama.

County is not liable for the purchase of a stove and cooking utensils used in preparing food for prisoners when the kitchen in which said food is prepared is not located in the jail.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of April 18, 1939, in which you request my opinion as follows:

"I am writing you in regard to the purchase of a stove, cooking utensils and fuel used in preparing food for prisoners in our jail.

"I wish to know if the ruling by Attorney General in the Biennial Report Attorney General, Oct. 1, 1926-Sept. 30, 1928, page 201 still holds? If it does not I should like to have an opinion from your office in regard to same."

I wish to advise that the Attorney General's opinion reported in Biennial Report of Attorney General, October 1, 1926-September 30, 1928, page 201, has been partially overruled by the courts in the case of **Holcombe vs. Mobile County,** 155 So. 640, 229 Ala. 77, and by an opinion of the Attorney General rendered to Hon. J. Lee Smith, Judge of Probate, Chilton County, Clanton, Alabama, on February 28, 1936, and reported in Quarterly Report of Attorney General, Vol. II, page 241, a copy of which I am enclosing. I think this opinion fully answers the questions asked in your inquiry.

However, said opinion is not as clear as it might be on the question as to whether the county is liable for a stove and cooking utensils used in preparing food for the prisoners when the kitchen in which their food is prepared is outside of the jail. I think the enclosed opinion decides this question, but to further clarify the situation I state that it is my opinion that the county is not liable for the purchase of a stove and cooking utensils used in preparing food for prisoners when the kitchen in which said food is prepared is not located in the jail. It will be noted that in **Holcombe v. State,** 155 So. 640, 229 Ala. 77, the Supreme Court of Alabama holds that the county is not liable for fuel in cooking such food, but that it is liable for a stove and cooking utensils. It will also be noted that this decision is based on their interpretation of Section 4878 of the Code of Alabama of 1923, which is as follows:

"4878. Expense of maintenance, etc., how paid.—The expense incident to the construction, maintenance, sanitation, healthfulness and hygiene of each county jail, prison, and almshouse in this state shall be paid out of the funds of the county in which such institution is located and of the town or city, if the institution be a town or city institution."

In discussing this section, they say:

"Section 4878, Code, relates only to the expense of construction, maintenance, sanitation, healthfulness and hygiene of the buildings named. The term 'maintenance' there has no relation to the prisoners, but to the jail and its equipment. That term so used would no more require the county to furnish fuel to cook the food than to furnish the food itself. To extend it beyond maintenance of the building and its equipment would go beyond its language, and its setting, and be contrary to the terms of the Acts of 1923 and 1927, supra."

From this discussion it seems apparent to me that the county is liable for the purchase of a stove and kitchen utensils only when such are considered integral parts of the jail. Certainly, if this section does not impose upon the county the liability of furnishing fuel for cooking in the jail, it would not authorize the purchase of a stove or cooking utensils that are not to be put in the jail.

I call your attention to an opinion rendered to the Sheriff of Russell County on September 29, 1937, (Quarterly Report, Attorney General, Vol. VIII, page 340) which deals with an analogous situation and which supports the position here taken.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. Harry E. Smith,
Sheriff, Jefferson County,
Birmingham, Alabama.

Executions and Judgments—

Bank deposits are subject to garnishment. In order for garnishment to issue under Section 6189 there must have been an issuance of an original attachment. However, deposits in bank can be reached by regular garnishment proceedings under Chapter 298 (Sections 8051-8093), Code of 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 20, 1939, in which you request my opinion as follows:

"Please advise me whether or not, in your opinion, in my capacity as Sheriff of Jefferson County, Alabama, I, or any of my deputies that are properly commissioned and bonded, would be authorized to institute any form of garnishment or attachment against a banking institution on funds

on deposit in said banking institution to the credit of a judgment defendant, against whom a writ of fieri facias has been issued on said judgment by the Clerk of the Circuit Court and delivered to me for execution, and who has no other tangible personal or real property than the money on deposit to his credit as aforesaid.

"In your opinion, please specify whether there would be any distinction to be made between the principal amount of the judgment and the interest on same and the costs of court, all of which I understand to be a part of the judgment.

"Please specify, too, whether any distinction should be made in writs of fieri facias delivered to me by the Circuit Clerk against a judgment defendant has been properly returned 'no property found' by proper officer."

Under the facts stated, it appears that you have in your possession a writ of fieri facias issued under Section 7793, Code of 1923.

Bank deposits have been held to be subject to garnishment. **7 Corpus Juris 671, Gladden v. Columbiana Savings Bank,** 235 Ala. 541, 180 So. 548, and cases cited. However, said deposits cannot be reached by a writ of fieri facias as the deposit is the property of the bank and not the depositor, there being only a debtor-creditor relationship. Said deposits could be reached by regular garnishment proceedings under Chapter 298 (Sections 8051-8093) Code of 1923.

The provision of law for the issuance of garnishments by sheriffs is Section 6189, Code of 1923, which must be construed in connection with Section 6188, Code of 1923. These sections provide as follows:

"6188. Attachment, property subject to; how executed.—Attachments may be levied on real estate, whether a fee simple or any less legal estate, or on personal property of the defendant; or may be executed by summoning any person indebted to the defendant, or liable to him on a contract for the delivery of personal property, or for the payment of money which may be discharged by the delivery of personal property, or on a contract payable in personal property, or a person having in his possession, or under his control, any money or effects belonging to the defendant; and the officer executing the writ must indorse such levy or service thereon and, if practicable, take the property into his possession, unless replevied as hereinafter prescribed."

"6189. Garnishee cited to appear and answer.—When attachment is executed by summoning a person indebted to the defendant, such person is called the garnishee, and the summons must be to answer as garnishees are required to answer, and upon return of an attachment so executed proceedings may be had as in other cases of garnishment."

Our Supreme Court in the case of **Donald Bros. & Company v. Nelson & Sons,** 95 Ala. 111, 10 So. 317, held that the issuance of an original attachment and possession by the sheriff are essential prerequisites to a valid execution by service of garnishment under Section 6189, Code of 1923, supra. Therefore, unless there had been an original attachment first issued, the sheriff is not authorized to issue a garnishment. The issuance of the fieri facias is not, in my opinion, tantamount to the issuance of an attachment.

Therefore, it follows that your first inquiry should be answered in the negative. However, as above stated, the bank deposit in this instance could be reached by regular garnishment proceedings under Chapter 298 (Sections 8051-8093), Code of 1923.

In answer to your second inquiry, I am of the opinion that there is no distinction to be made between the principal amount of the judgment and interest. Also there is no distinction to be made as regards costs if there be a judgment against the defendant for the costs.

In answer to your third inquiry, I am of the opinion that "alias" writs may be issued. The fact that the first writ was returned "No Property Found" would not prevent the issuance of other writs.—**Sections 6174 and 7802, Code of 1923.**

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

The Alabama Alcoholic Beverage Control Board may promulgate reasonable rules and regulations, not in conflict with Section 820 of the Code of 1923, allowing reimbursement for actual traveling and living expenses to its officers and employees incurred by them when they are away from their homes in the performance of the duties assigned to them by said Board, and such officers and employees are not subject to the provisions of the McGowin Act, Act No. 87 (General Acts, 1933, p. 81), approved March 23, 1933.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 2, 1939, in which you request my opinion as follows:

"We request your Opinion relative to expenses incurred by officials and employees of the Board when away from their homes performing duties assigned to them by the Board. Section 5 of the Alabama Beverage Control Act reads as follows:

" 'The Administrator, with the approval of the Board, shall fix the duties, salaries and wages of all employees authorized by this Act, but such compensation, salaries and wages shall not be greater than

the salaries fixed for similar positions and duties in other departments of the State Government.'

"Section 6 sets out the functions, duties and powers of the Board and we call your attention to Article (h) of Section 6, which reads as follows:

" 'To appoint every officer, agent, and employee, in accordance with the qualifications specifically set out in this Act, required for the operation of the business of said Board, dismiss them, fix their salaries or remunerations, assign them their official positions and titles, define their respective duties and powers, require them or any of them to give bonds payable to the State in such penalty a shall be fixed by the Board, and engage the services of experts and of persons engaged in the practice of a profession.'

"In carrying out the provisions of the Alabama Beverage Control Act, it is necessary for the officials and employees to be away from home and in some instances to travel to other States.

"We will appreciate very much your advising us as soon as possible if there is any limitation on expenses incurred by officials or employees when performing duties assigned to the Board, provided, such officials or employees furnish an itemized statement verified by an affidavit with vouchers for same thereto attached.

"At the present time, we are holding certain expense accounts until we receive this Opinion and your usual prompt response will be appreciated."

This office, in an opinion to Hon. W. O. Baldwin, the then Chairman of the Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of September 18, 1937 (Quarterly Report of Attorney General, Vol. VIII, p. 257) spoke as follows:

"Under Section 6(h) of the Alabama Beverage Control Act, the Board is given the power to appoint officers, agents and employees and to 'fix their salaries and remunerations.' While there is a well recognized distinction between 'salary' or 'compensation' and an 'allowance for expense' Quarterly Report II, p. 161 at p. 163) in my opinion this power to assign such agents to various duties, carries with it the power of the Board to promulgate reasonable regulations for travel and living expense of such field agents while engaged in their official duties."

We adhere to the view there expressed.

Section 7(a) of the Alabama Beverage Control Act provides:

"The Board may from time to time make such regulations not inconsistent with this act as it shall deem necessary for carrying out the provisions of this act, and from time to time, alter, repeal or amend such regulations, or any of them."

The premises considered, we advised you that the Alabama Alcoholic Beverage Control Board may promulgate reasonable rules or regulations allowing the officers and employees of said Board reimbursement for actual traveling and living expenses incurred by them when they are away from their homes performing the duties assigned to them by the Board.

We are of the opinion notwithstanding the provisions of the McGowin Act, (Act No. 87, General Acts, 1933, p. 81, approved March 23, 1933) which reads as follows:

> "Section 1. The maximum amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense of transportation shall be $3.00 per diem."
>
> "Section 2. This Act shall become effective upon its passage."

This for the reason that the Alabama Beverage Control Act was passed subsequent to the McGowin Act on, to wit, February 2, 1937, and by Section 61 thereof all laws or parts of laws in conflict therewith, except as therein specifically provided, were repealed. This is the latest expression of the legislative will on this subject and, consequently, we are of the opinion that the above-cited provisions of the Alabama Beverage Control Act repeal or supersede the provisions of the McGowin Act, supra, insofar as the officers and employees of the Alabama Alcoholic Beverage Control Board are concerned. Cf. Opinions of the Attorney General to Hon. I. T. Quinn. Commissioner, Department of Conservation of Game, Fish and Seafoods, Capitol, under date of October 15, 1935 (Quarterly Report of Attorney General, Vol. I, p. 74); to Hon. I. T. Quinn, Commissioner, Department of Conservation of Game, Fish and Seafoods, Capitol, under date of April 3, 1936 (Quarterly Report of Attorney General, Vol. III, p. 11); and to General John C. Coleman, Adjutant General, Capitol, under date of October 7, 1937 (Quarterly Report of Attorney General, Vol. IX, p. 25).

Therefore, you are advised that there is no maximum limit on the amount that the Aabama Alcoholic Beverage Control Board may allow as reimbursement to its officers and employees for traveling and living expenses incurred by them when they are away from their homes in the performance of the duties assigned to them by said Board. If the Board has placed a maximum limitation on the same by rule or regulation promulgated by it, the Board may, in accordance with the provisions of Section 7(a) of the Alabama Alcoholic Beverage Control Act, supra, repeal the same.

Of course, claims for such expenses must be itemized, verified by affidavit, with vouchers therefor attached, in accordance with the provisions of Section 820 of the Code of Alabama, 1923, before the Comptroller can lawfully issue a warrant in payment of the same. See opinion to Hon. B. P. Singleton, State Comptroller, Capitol, under date of April 22, 1939, a copy of which has previously been furnished to you. The opinion to Hon. W. O. Baldwin, supra, is hereby overruled insofar as it conflicts with the holding of the opinion to Hon. B. P. Singleton, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 16, 1939.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,

Birmingham, Alabama.

1. The duties of a Tax Assessor as Secretary to the Board of Equalization are ministerial.

2. A Tax Assessor has authority to delegate a deputy to act as Secretary to the Equalization Board.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion under date of April 20, 1939, which is as follows:

"The new Equalization Board, which is now in process of being formed provides in the Act creating such Board, that the Tax Assessor shall be Secretary without a voice or vote. Under the circumstances, a clerk who is able to keep up with the work in that department would be just as able to act as secretary as would the Tax Assessor and at the same time this would relieve the Tax Assessor of clerical work which would enable him to give more time to the duties of his office as Tax Assessor.

"Please advise me if this work can be delegated to a deputy or clerk by the Tax Assessor."

It is my opinion that your inquiry should be answered in the affirmative.

Section 8 of Act No. 143, S. B. 14, approved March 15, 1939, which created County Boards of Equalization, requires Tax Assessors to serve as Secretary to said Boards, and reads as follows:

"Section VIII. The County Tax Assessor shall be and serve as the Secretary of the County Board of Equalization but shall not receive any compensation for his services as such but have no vote nor voice in the government or business of said Board except as hereinabove provided."

A Tax Assessor has authority to appoint deputies to assist him in the performance of his official duties, and acts performed by such deputies have the same force and effect as if performed by the Assessor. The Assessor is responsible for any loss suffered by any taxpayer, the State, or the County by reason of any unlawful act of a deputy. The authority of the Tax Assessor to appoint deputies with such powers is found in Section 26 of Revenue Act of 1935, which was formerly Section 3043 of the Code, the pertinent part of which reads as follows:

"Section 3043. The appointment of deputies; liability for acts of deputies.—The Tax Assessor is authorized to appoint deputies, and the acts

of such deputies shall be recognized as his acts, and he shall be responsible for any loss sustained by any taxpayer or by the State or county, by reason of any unlawful act done by any such deputy."

The duties of public officers are generally classified as either judicial or ministerial. In the case of **Merlette vs. State, 100 Ala.** 42, 14 So. 562, we find the definition and distinction between judicial and ministerial duties, and for convenience the same is hereby quoted:

"Judicial power is authority vested in some court, officer or person, to hear and determine with the rights of persons or property, or the propriety of doing an act, are the subject matter of adjudication. Official action, the result of judgment or discretion, is a judicial act. A duty is ministerial, when the law exacting its discharge, describes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act."

The law prescribes the time, the mode, and the occasion for the performance of the duties of a Tax Assessor, while acting as Secretary to the Board of Equalization, and leaves nothing to his discretion. This, in my judgment, makes his acts ministerial, therefore, the question arises as to whether the performance of these ministerial acts can be delegated to a deputy or a clerk. For many years the rule of law has prevailed that the performance of a ministerial act may be performed by an assistant or deputy. The one primarily charged with the performance of a ministerial duty may delegate such authority to a deputy. **Merlette vs. State,** 100 Ala. 42, 14 So. 562; **Lucas vs. Belcher,** 20 Ala. App. 507, 103 So. 909.

It is, therefore, my opinion that you have the authority to designate a deputy or a clerk in your office to serve as Secretary to the Equalization Board.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. Frank M. Dixon,
Governor of Alabama,
Capitol.

Dauphin Island Bridge Proposal—Mobile County may construct toll bridge from mainland of Mobile County to Dauphin Island and issue bonds, not obligations of the County, in payment thereof. The maintenance of said bridge may be assumed by the State (1) if said bridge remains the property of the county under contract with the county or (2) if taken over by the State as part of the State Highway System.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 10, 1939, in which you request my opinion as follows:

"It is proposed that Mobile County shall issue Revenue Bonds in the principal amount of $900,000, maturing twenty-five years from that date, secured by and payable out of tolls from the Dauphin Island Bridge to be constructed out of the proceeds derived from the sale of said bonds to the Reconstruction Finance Corporation, such bonds to be issued pursuant to the provisions of the Acts of the Legislature of 1931, page 186, or the Acts of the Legislature of 1935, page 195.

"The proposed Dauphin Island Bridge is planned to be constructed from a point on the west side of Mobile Bay to Dauphin Island, in such manner as to connect with a public road on the north and to terminate on Dauphin Island in a public park comprising about 267 acres of land on Dauphin Island now owned by the City of Mobile, but which is proposed to be conveyed by such City to the State or to a public park commission.

"In connection with the issuance and sale of such revenue bonds by the County of Mobile, it is further proposed that the Gulf Properties Corporation, which owns a considerable portion of Dauphin Island, shall execute a mortgage or deed of trust to the trustee named in the instrument pledging the tolls as security for the revenue bonds, in and by which mortgage or deed of trust the Gulf Properties Corporation would in effect and to the extent of $100,000 guarantee that the total revenue over and above the amount required annually to pay the interest on the bonds and to create a sinking fund for the retirement thereof, (after the first two years following the completion of the bridge) would be sufficient to pay the fixed annual expenses for the operation of the toll bridge, estimated to be approximately $16,000, and will make provision for such guarantor to pay the trustee any deficit to the extent of $100,000 in the aggregate.

"It is also contemplated that the State of Alabama, by and through the State Highway Department, in consideration of the construction of said bridge and the acceptance of such bridge as a part of the State Highway system, subject to the operation thereof as a toll bridge, and the pledge of such tolls as security for such construction bonds, shall agree to maintain such bridge to the following extent, namely:

"(a) That the State, through its State Highway Department, for the first two years after the completion of the bridge, shall assume the expense of maintenance and operation of the bridge irrespective of the amount of tolls derived therefrom within such two year period, but with certain provisions in and by which the State will be entitled to be reimbursed out of such toll revenues if the same are sufficient, or later accrue in such amounts as to permit reimbursement after first making provision for necessary interest, sinking fund and the reserve required in connection with the issuance of the bonds;

"(b) After the first two years following the completion of the bridge it is contemplated that the State of Alabama, by and through the State Highway Department, will assume the expense of maintenance of said

bridge over and above the fixed operating expenses thereof collaterally guaranteed by the Gulf Properties Corporation.

"Such obligations of maintenance and operating expenses for the first two years after completion, and maintenance expenses thereafter, to be assumed by the State Highway Department, are proposed to be paid from time to time by the State Highway Department out of funds available to it for the maintenance of highways, roads and bridges in the State. Such maintenance and operations are to be under and subject to the supervision of the State Highway Department, and any such obligation of maintenance may be performed in work and labor or materials furnished or provided by the State Highway Department, and such obligation is not to be in such form as to require the payment by the Department of a money obligation, unless it elects to pay such expense rather than to perform the maintenance by and through its own employees or agencies. During the first two years in which the State is required to assume both the expenses of maintenance and operation it would be necessary for the State Highway Department to pay certain insurance premiums coverings risks against which insurance is available, and to pay salaries of all toll operators and to furnish incidental supplies for the operation of the toll bridge as distinguished from and in addition to actual work of maintenance. A copy of the estimated cost of the operation and maintenance of the proposed bridge prepared by the State Highway Department is herewith submitted for your information, in which the annual maintenance and operating expense is estimated at approximately $23,122.85.

"It is, of course, contemplated that Mobile County will give such consent as may be necessary for the State to take over the bridge and to include the same as a part of the State system of roads and bridges, subject to the operation of the bridge under tolls and to the rights of the holders of the bonds secured by the pledge of such tolls until such bonds have been liquidated.

"Provision is to be made for the payment of all maintenance and operating expense of the bridge out of the tolls, if such tolls produce sufficient revenue, after first meeting the requirements for interest and payment of the bonds, in such manner as the State may eventually be able to have reimbursed to it any and all expenses of operation or maintenance which may have been advanced by it; however, the general faith and credit of Mobile County is not to be pledged for the payment of these bonds. The bonds are not to be issued as obligations of the State and the State of Alabama is not to assume any obligation for the payment of the principal or interest of such bonds. It is proposed that upon the issuance and sale of the bonds by Mobile County that Mobile County will on competitive bids let the contract for the construction of said bridge and that the construction of said bridge and that the construction thereof will be under the supervision of Mobile County.

"Of course, the State Highway Department will expect to examine the plans and specifications for the construction of the bridge before making any agreement for the subsequent acceptance thereof as a part of the State Highway system, subject to the tolls and the rights of the bondholders therein.

"As an alternative to the proposal that the State of Alabama, through its State Highway Department, enter into a contract or agreement to ac-

cept said bridge as a part of the State system of highways, roads and bridges, subject to the tolls and outstanding bonds secured thereby, and in consideration thereof to maintain and operate said bridge to the extent and in the manner as hereinabove mentioned, it may be desirable for the State Highway Department to assume, to the extent hereinabove expressed, the maintenance and/or operation of said bridge by charging the cost thereof as county aid appropriated or extended by the Department to Mobile County, and permit the bridge to remain as a County bridge rather than to accept the same into the State system of highways, roads and bridges.

"Your opinion is respectfully requested upon the following questions in connection with this matter, namely:

"(1) May the State of Alabama, by and through the State Highway Department, lawfully accept or agree to accept said toll bridge when so constructed as a State highway or bridge or as a portion of a state system of highways, roads and bridges, subject to the operation thereof under tolls and subject to the security rights of the holders of bonds so issued by Mobile County for the purpose of constructing this bridge?

"(2) May the State, by and through the State Highway Department, legally enter into any agreement or contract to either maintain or operate said bridge to the limited extent hereinabove mentioned, while such bridge remains as a County bridge, and in such case may the Department charge any such maintenance or operating expenses as County aid rendered by the Department to Mobile County, or may any arrangement be legally made by the Department to assume the maintenance or operation to any extent for and on account of Mobile County without accepting the bridge as a State highway road or bridge?

"(3) May the State of Alabama, by and through its State Highway Department, lawfully enter into any contract or agreement for the maintenance and/or operation of such bridge after completion, subject to tolls thereon and security rights of such bondholders, in the manner substantially as hereinabove outlined.

"(4) Would any such contract or agreement entered into by the State Highway Department with reference to the maintenance and/or operation of said bridge after completion and after said bridge shall have been accepted or adopted by the State Highway Department as a part of the State system of highways, roads and bridges, constitute a valid and binding obligation on the part of the State, and such an obligation as it would be the duty of the State Highway Department to pay or perform so long as the State Highway Department had sufficient funds available for the maintenance of the State highways, roads and bridges, including such bridge?

"(5) What rights, if any, would be available to the bondholders in the event of a failure or refusal of the State of Alabama, its State Highway Department, or the officers or agents thereof (assuming the existence of ample funds available for the performance of such maintenance and/or operating expense obligation as the State Highway Department may have assumed) to enforce the performance, or to prevent a breach of such maintenance and/or operation agreement on the part of the State Highway Department with respect to such bridge?"

Rather than answer each of your inquiries categorically, I will discuss the circumstances of the proposal in question in conformity with your inquiries. I think this is the best method of treating the subject in order to give the desired information.

Mobile County has authority to construct and finance the bridge in question either under Acts 1931, page 186, or Acts 1935, page 195.

Acts of 1931, page 186, is a general act of local application to counties of 100,000 and less than 300,000 population, authorizing such counties to build a bridge and issue such bonds in payment thereof. Said bonds shall not be deemed or held as to principal and interest to be a general obligation or liability of the county.

Acts of 1935, page 196, is known as the "Municipal Bond Act of 1935." Said Act authorizes counties to build such a bridge and issue such bonds in payment thereof. Said bonds, either as to principal or interest, are not to be obligations of the county.

It will be noted that bonds issued under either of the above Acts shall not be a charge upon the county. Said bonds, both as to principal and interest, shall be paid out of the revenues derived from the tolls. Same, therefore, would not affect the constitutional debt limit of the county. **In re Opinions of the Justices,** 230 Ala. 673, 163 So. 105.

After the bridge in question is constructed and the bonds issued and sold, the question then presents itself as to whether or not the State of Alabama has authority to provide for the maintenance of said bridge (upkeep, operation expenses, collection of tolls and carrying insurance) in case (1) the bridge remains the property of Mobile County, or (2) the State takes over the bridge as part of the State Highway System.

If the bridge remains the property of the county, in my opinion, the State could contract with Mobile County for the maintenance of said bridge under Section 1397 (29) of Michie's Code of 1923 (General Acts 1927, page 356), which provides as follows:

> "1397(29). Contracts with counties, municipalities, etc.—The State Highway Department may enter into contracts with any of the counties of the state, or with any of the municipalities of this state as it may with individuals, firms or private corporations, to do any work in the construction, repair or maintenance of the roads, bridges or highways in this state."

The above-quoted section gives the State Highway Department the authority to enter into contracts with the counties for the maintenance of roads, bridges or highways in this state. Said section, in my opinion, is sufficiently broad to authorize the state to enter into a contract with Mobile County for the maintenance of said bridge after same is completed.

If the State enters into such a contract with Mobile County, I do not think that the costs incurred by the State in said maintenance can be charged against Mobile County against its State-aid participation. Section 1397(25) of Michie's Code of 1928 (Acts 1927, page 355), relative to applications by

counties for State aid, is applicable only to a State trunk road or a bridge on a State trunk road. Since this bridge would remain the property of the county it could not be deemed on a State trunk road.

However, if such a contract were consummated, it is doubtful that the bondholders would have the right to have same enforced. Any action for the enforcement of such contract would, in my opinion, necessarily have to be instituted by Mobile County.

Under the plan to have said bridge taken over by the State as part of the State Highway System, it is my judgment that the State would have this authority. Section 1397(7) of the 1936 Supplement to Michie's Code of 1928 (General Acts 1935, page 775), provides in pertinent part as follows:

> "1397(7) (1303). Duties and Powers of Commission.—The State Highway Commission shall consider and determine all questions relating to the general policy of the State Highway Department and the conduct of its work and in the performance of its duties. It shall be the duty of the department to designate the roads to be constructed, repaired and maintained and to contract, standardize, repair and maintain roads and bridges of this state; ***"

Under the above, the State Highway Department has the authority to designate the roads to be constructed, repaired and maintained. Such authority, in my opinion, is sufficiently broad to authorize the Highway Department to take over the bridge in question.

Said bridge, however, would not be considered on a State trunk road as same are specifically designated in Section 1391 of Michie's Code of 1928. Section 1397(38) (General Acts 1927, page 360), relative to changes and additions to State trunk roads, is not applicable as said section applies only to changes in the State trunk road system as to conform to the requirments of the Federal Aid Law. No Federal Aid is involved in this particular project.

If said bridge were taken over by the State as part of the State Highway System, under the authorities above-cited, the State would be required to maintain same as it would any other part of the State Highway System under the general law. **Scott v. Alabama State Bridge Corp.** 233 Ala. 12, 169 So. 273. In said case the court, in considering the leasing of the fifteen toll bridges by the State Highway Department from the Alabama State Bridge Corporation, stated:

> "These bridges are on state highways, so stated in the original bridge act. When coming under the control of the Highway Department, the duty to maintain or reconstruct same is referable to the general law, just as other bridges on our highways. This stipulation to perform such duty implies that it will be done from funds available, without incurring a debt within the meaning of Section 213."

However, if said bridge were taken over by the State as part of its State Highway System and the State is required to maintain same, it is doubtful if the bondholders could by legal proceedings compel such maintenance as such maintenance is for the benefit of the public generally and not for the benefit of the stockholders. Under Section 1397(7) of the 1936 Supplement of Michie's Code of 1928, supra, the Highway Commission could designate such bridge as a

part of the State Highway System and it probably would have the authority to discontinue said bridge as part of the State Highway System. This is merely a contingency that might arise, but looking at the situation from a practical standpoint such abandonment is improbable.

An agreement to pay the maintenance costs in question out of any surplus of the Gasoline Tax would not create a debt against the State by Section 213 of the Constitution, as amended by Article XXVI. **Scott v. Alabama State Bridge Corp.,** supra, **Long v. Alabama Highway Corporation,** 234 Ala. 142, 174 So. 41; **Rogers v. Garlington,** 234 Ala. 13, 173 So. 372; **Alabama State Bridge Corp. v. Smith,** 217 Ala. 311, 116 So. 695.

In view of the doubt that arises as to some of the phases of each of the proposals contemplated, as above expressed, I respectfully recommend that the safest procedure to follow would be to have the Legislature pass applicable legislation specifically authorizing the project in full under either of the two alternative methods in question.

I hope the above will give you the information you desire.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. E. A. Parley,
Clerk, Board of Revenue,
Marengo County,
Linden, Alabama.

Warrants—County Depository cannot be compelled to return warrants to the Board of Revenue after County Depository has paid out county funds under authority of said warrants.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of March 17, 1939, in which you request my opinion as follows:

"The Planters Bank & Trust Company of Thomaston, Alabama, is the County Depository for Marengo County.

"Some time ago we requested verbally that the Depository mail us the vouchers on the first of the month just as they mail other depositors their cancelled checks. The Depository took the position that it could not do this, and thereupon the Board of Revenue passed the enclosed resolution.

"After we sent the Depository a copy of the enclosed resolution, it still declined to return the cancelled vouchers to us without a ruling by you as to whether or not it should return them.

"Will you be so kind as to advise the Board of Revenue whether it is entitled to have the County Depository return it the cancelled vouchers on the first of each month?"

In my opinion the County Depository cannot be compelled to return warrants to the Board of Revenue after County Depository has paid out county funds under the authority of said warrants.

The law requires the bank to return cancelled checks to its depositors, but I know of no law which requires a county depository to return warrants drawn on it to the drawer.

It is the duty of a bank, on request of its depositor, to furnish him with a statement of his account, and to accompany such statement with the checks it has paid as vouchers for such payments. **9 C. J. Secumdum, p. 554.** See also **England National Bank v. U. S.** 282 Fed. p. 121.

There is quite a difference between a bank's returning individual depositors their cancelled checks and a bank, as a County Depository, returning warrants drawn on it by the Probate Judge or Board of Revenue to the drawer.

Checks are negotiable instruments but warrants are not. See **19 R. C. L. 1037; 2 Dillon on Municipal corporations 5th Edition, p. 1295; Town of Bithlo v. Bank of Commerce,** 110 So. 837.

At common law a check was defined as a draft or order on a bank or banking house purporting to be drawn on a deposit of funds for the payment at all events of a certain sum of money to a certain person. **10 C. J. S. p. 408.**

The Negotiable Instruments Act defines a check as a bill of exchange drawn on a bank, payable on demand. **Brannon's Negotiable Instrument Law, page 1126.**

"A warrant is the command of the council, board, or official, whose duty it is to pass upon the validity and determine the amount of a claim against the municipality, to the treasurer to pay money out of any funds in the city treasury, which are or may become available for the purpose specified, to a designated person whose claim therefor has been duly adjudged and allowed." 2 Dillon on Municipal Corp. (5th Ed.) 1283.

In State v. City of Mobile, 229 Ala. 93, 155 So. 872, the Supreme Court said:

"Warrants are generally orders payable when funds are found, and there is propriety in the rule providing that they shall be paid in the order of presentation, the time of presentation to be indorsed by the treasurer on the warrants."

The warrant drawn by the Probate Judge on the Depository is the Depository's authority for the payment of the county funds, and if the Deposi-

tory was required to return the warrant to the Board of Revenue the Depository would be placed in the position of paying out county funds under the authority of a warrant which had been returned to the drawer. In other words, the Depository would be without primary evidence as to its authority to disburse the county funds.

The premises considered, it is, therefore, my opinion that a county Depository cannot be compelled to return warrants to the Board of Revenue after County Depository has paid out County funds under authority of said warrants.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. W. L. Hobbs,
Clerk, Circuit Court,
Russell County,
Phenix City, Alabama.

Russell County—Clerk hire—The Clerk of the Circuit Court of Russell County, Alabama as ex officio clerk of the County Court of said county is not authorized under Act No. 39, House Bill No. 212, approved February 1, 1937, which Act created the County Court of Russell County, Alabama, to pay from the County Court fund a salary for a part-time clerk for said County Court.

Opinion by Assistant Attorney Russell.

Dear Sir:

I have your request of March 23, 1939, which is as follows:

"House Bill No. 212 (Britton) approved February 1st, 1937, creating the County Court of Russell County, Alabama provides among other things:

" 'The maintenance of said Court shall be the same as provided by law for the maintenance of County Courts, EXCEPT that any amounts expended therefor shall be paid out of said County Court Fund.'

"Kindly advise if we may pay the sum of $25.00 per month from the above County Court Fund as salary for a part-time clerk of the County Court.

"The duties of this office are such as to require most of the time of the Circuit Clerk, and it is necessary that additional Clerk hire be employed."

I answer your inquiry in the negative.

The County Court of Russell County, Alabama, was created by Act No. 39, House Bill No. 212, approved February 1, 1937. Section 3 of said Act provides that the Clerk of the Circuit Court of Russell County, Alabama, shall be ex officio clerk of said county court and further provides for his fees and the method of paying the same. Said section is as follows:

> "Section 3. That the clerk of the Circuit Court of Russell County, Alabama, shall be ex officio clerk of the County Court of Russell County, Alabama and his fees and the method of paying same shall be as allowed for similar services in the County Courts of this State."

It will be noted that the above quoted section, supra, provides that the Clerk of the Circuit Court of Russell County, Alabama, shall receive for his services as Clerk of the County Court of said County the fees allowed to him by law for similar services in the County Courts of the State and the method of paying said fees is the same as provided for by the law of the State relative to clerks of County Courts. The law providing for the fees of clerks of County Courts and the method of paying the same is found in section 3804 of the Code of Alabama, 1923, which is as follows:

> "Section 3804—The fees and compensation of said clerks for their duties as clerks of the County Court shall be the same as now allowed by law to the Clerks of the Circuit Court in criminal cases, and shall be paid in like manner."

From the foregoing sections, supra, it will be seen that the clerk of the Circuit Court of Russell County, Alabama is compensated for his services as Clerk of the County Court of said county on a fee basis. Attention is further called to the fact that the clerk of the Circuit Court of Russell County, Alabama, is compensated for his services as clerk of the Circuit Court on a fee basis (Code of Alabama, 1923, Section 3739) and from the fees derived from services performed as clerk of the Circuit Court is required to pay the salaries of his assistants. A careful examination of Act No. 39, House Bill 212, approved February 1, 1939, as a whole, discloses that said act fails to make any provision for the hire of a part-time clerk or an assistant to aid the clerk of said court in the discharge of his duties nor does it provide for the payment of a salary for a part-time clerk or assistant. It is true that Section 8 of the said Act provides that all fines, penalties and forfeitures imposed by the court together with the Solicitor's fees and trial tax are paid into the Depository of the county and there kept separate from other funds of the county and known as the "County Court Fund." It is also true that Section 10 of said Act provides that the maintenance of said county court shall be the same as provided by law for the maintenance of County Courts, except that any amounts expended therefor are paid out of the "County Court Fund." However, it is my judgment that the word "maintenance" as used in Section 10 of said Act does not include nor was it the intention of the Legislature for it to include the payment of a salary for a part-time clerk for said County Court. But on the contrary the Circuit Clerk as clerk of the County Court must pay the salary of a part-time clerk or assistant when it becomes necessary to employ a part-time clerk to carry out the duties of the office. As heretofore pointed out, the Circuit Clerk is compensated for his services as clerk of the Circuit Court on a fee basis and from his fees must pay the salaries of his assistants and therefore in my opinion, by analogy the compensation of a part-time clerk or assistant to aid the clerk of the County Court in carrying out the duties and functions of said office must be paid by the said clerk from the fees he de-

rives from said office as there is no provision for the payment of a salary of a part-time clerk in the act creating said County Court.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. P. A. McDaniel, Jr.,
Superintendent of Education,
Barbour County,
Clayton, Alabama.

Schools—Deeds—

Under facts stated County Board of Education, or settlement (which was named as grantee in a deed) have no right to remove school building on property in question.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your request for official opinion under date of April 15, 1939, which is as follows:

"The following deed to one acre of land was given by Page Floyd to the 'Settlement' for school purposes:

"'State of Alabama, )
Barbour County. )

Know all men by these presents that I, Page Floyd, do this day give and deliver unto this Settlement the following described lands to-wit: one acre lying in the NE¼ of SE¼, Section 29, Township 10, Range 26, making the public road the line on the west side; thence east seventy yards; also north seventy yards to the half-mile line, said line being the boundary line on the north side. To have and to hold so long as there is a school house on said lands after which the said lands are to return to the owner of the surrounding lands. Given under my hand and seal this, 29th, December, 1885.

"'Witnesses:
John T. Watkins
D. K. Thomas (Signed) Page Floyd L. S.'

"A one-room school building lies or is situated on this lot. Does the settlement or does the County Board of Education have the legal right to move the building from the above described land?"

I am of the opinion that your inquiry should be answered in the negative.

There must be a grantor and a grantee in order that there may be a valid deed. There must be a grantee capable of taking and holding in his own right or as trustee. A deed in order to pass title must designate the grantee without uncertainty. **18 Corpus Juris, 158, 174.** The following descriptions as grantee have been held insufficient:

"Descriptions held insufficient. (1) 'The owners . . . of the brick house, and curtilage adjoining the property hereby conveyed on the west side thereof.' Schaidt v. Blaul, 66 Md. 141, 143, 6 A 669. (2) 'The people of the county of Otsego.' Jackson v. Cory, 8 Johns. (N. Y.) 385. (3) 'The members' of a named church. Morris v. State, 84 Ala. 457, 4 S 628. (4) 'The inhabitants' of the town of Rochester. Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73. (5) 'The inhabitants' of two districts. Hunt v. Tolies, 75 Vt. 48, 52 A 1042. (6) A 'neighborhood.' Thomas v. Marshfield, 10 Pick. (Mass.) 364. (7) Where 'the estate of' a deceased person was designed as grantee, a devisee was held to take nothing, and likewise a purchaser of the devisee's interest. Simmons v. Spratt, 20 Fla. 495."

The deed under consideration named the "Settlement" as grantee. In view of the above authorities, I am of the opinion that said deed was void for the lack of a proper grantee.

The deed being void, no sort of title, defeasible or otherwise, was divested out of the grantor, Floyd. The building, when erected, became a part of the realty and became the property of Floyd or his successors in title. Neither the county board of education nor the citizens of the community, acting in concert, has a legal right to remove the same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. Ed. Pettus,
Secretary-Treasurer,
State Licensing Board for General Contractors,
223-225 Bell Building,
Montgomery, Alabama.

Contractors:

"Residence" or "private dwelling", as used in Section 13 of Act No. 297, S. 112, approved September 2, 1935 (General Acts 1935, p. 721), does not include an apartment house or apartment building but means a dwelling house for a single family .

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion under date of March 24, 1939, which is as follows:

"The State Licensing Board for General Contractors has instructed me to request from you an opinion on the following question:

"Does 'residence or private dwelling' as used in Section 13 of the Act, a copy of which is enclosed, include an apartment house or an apartment building or in other words is an apartment house or an apartment building a residence or private dwelling within the meaning of Section 13 of the Act?"

In my opinion, your question should be answered in the negative.

"Residence" or "private dwelling", as used in Section 13 of Act No. 297, S. 112, approved September 2, 1935 (General Acts 1935, p. 721) does not include an apartment house or apartment building but means a dwelling house for a single family. Section 13 of Act No. 297 supra, provides as follows:

"Section 13. The following shall be exempted from the provisions of this Act; the practice of general contracting as defined in Section 1 of this Act by an authorized representative or representatives of the United States Government, State of Alabama, incorporated town, city or county in this State; provided, however, that such operation shall be under the supervision of a licensed architect or resident engineer, **and the construction of any residence or private dwelling,** and provided further that any contractor now licensed to engage in the business of general contracting in the State of Alabama shall prima facie be entitled to a license, unless good cause should be shown to the Board why such license should not be issued to him, provided such contractor makes application for such license within sixty days after this Act becomes effective." Emphasis ours.

In the case of **Taylor v. Lambert,** 124 Atl. 169, the Supreme Court of Pennsylvania said:

"All doubts must be resolved against the restriction and in favor of a free and unrestricted use of the property. Such is the rule laid down in Johnson v. Jones, supra. But the words 'private dwelling house' have a much more restricted meaning than that attributed to 'dwelling house' or 'one single dwelling' in the prior cases. Their use not only exclude tenements or buildings erected and operated as a business venture, having many of the characteristics of a hotel, such as an apartment house, but there is a well-defined difference between an apartment house, operated by the owner for profit through leasing different stories or suites of rooms, and a dwelling intended and calculated to be for the sole and exclusive occupancy of one family, suitably constructed for that purpose. In the term 'a private dwelling' the word 'dwelling' restricts the character of building by eliminating all buildings for business purposes, such as stores, livery stables, garages, factories, and the like. The word 'private' further restricts the buildings to be placed thereon by excluding all such as are used for residential purposes of a public character, like hotels and general public boarding or apartment houses. An apartment house is not a number of private dwellings, built one upon another, but a collection of dwell-

ings objectionable to the restriction, which called for a single dwelling. Skillman v. Smatheurst, 57 N. J. Eq. 1, 4 40 Atl. 855, 856, where the restriction was against a building 'other than for the use or purpose of a private dwelling.' The restriction is in the singular, not in the plural. An apartment house is not strictly a private dwelling; it is a place for housing a number of people grouped in families assigned to different sections in the same structure. Carried to its logical conclusion (as the size increases so does the population), it would embrace a building 20 stories high, or 40 stories high. Ordinarily every one knows the difference between a private dwelling house and an apartment house."

**In Walker v. Haslett,** 186 Pa. 622, the Court said:

"For the purposes of our decision we shall assume that the covenant does not restrict the grantee of the lot to the erection thereon of but one dwelling. But, even so, defendant has violated the covenant, for the building erected by her is not a 'private' residence or a 'private' dwelling, and the covenant clearly forbids the erection of any building other than a 'private residence.'

"A house designed for the accommodation of more than one family cannot be deemed to be a 'private' residence or a 'private' dwelling. All the authorities agree that a 'private' residence or a 'private' dwelling is a building intended and designed for the convenient accommodation of but one family."

I also call your attention to the case of **Ward v. Prospect Manor Corporation,** 206 N. W. 856, in which the Supreme Court of Wisconsin, in construing a restrictive covenant, held that the term "private residence" or "dwelling house" meant a dwelling house for a single family, and that as a matter of law a duplex apartment house was in violation of said covenant.

The premises considered, it is my opinion that the term "residence" or "private dwelling" as used in Section 13 of Act No. 297 is used in a restrictive sense and does not include an apartment house or apartment building.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. Chris J. Sherlock,
State Highway Director,
Capitol.

State Highway Department—Sales Tax—

Under Subsection (f) of Section 2, Act No. 126, page 125, General Acts Extra Session, 1936-37, the State Highway Department is exempt from the payment of sales tax on merchandise and commodities which

are purchased directly by the State Highway Department for a lawful State purpose.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated March 24, 1939, which is as follows:

"Since passage of the Sales Tax Law the State Tax Commission has required Highway Department contractors to pay sales tax on all purchases of materials furnished to such contractors by vendors or manufacturers. No sales tax is, of course, charged on the sale of this material to the State by its Contractor, except to absorb the cost of the original sales tax in the prices bid to the State.

"On a number of projects certain items such as structural steel are contracted direct to the manufacturer by the Highway Department, payment being made for the material delivered in place in bridge structures, involving both materials, labor and rental of tools and equipment.

"Please advise if the manufacturer selling direct to the Highway Department is required to pay the Tax Commission and charge the Highway Department a sales tax, and if so, on what basis would the sales tax be assessed."

Subsection (f) of Section 2 of Act No. 126, page 125, General Acts, Extra Session, 1936-37 provides in part as follows:

"*** and there shall also be exempted from the gross receipts of sales so as not to be taxed so much thereof as is derived from sales of merchandise and commodities to incorporated cities and towns and the **State of Alabama** where such merchandise and commodities are purchased for lawful municipal or state purposes."

You will note from the above quoted subsection that all sales made direct to the State of Alabama are exempted from the payment of the sales tax, and this exemption would also extend to the Highway Department—it being a department of the State of Alabama and, therefore, a part of the State.

It is my opinion that any sale made direct to the State Highway Department would not be subject to the payment of sales tax. It is further my opinion that in a transaction as hypothecated by you in your request, the Highway Department, as such, would not be subject to the payment of a sales tax; and it is my opinion that under the facts as hypothecated, this would be a direct sale to an agency or department of the State of Alabama, and as such, would be exempt from payment of the sales tax under the provisions of the above quoted subsection.

It should be pointed out that if the manufacturer in this instance becomes a contractor or builder who purchases building materials for resale or use in the form of real estate such manufacturer will be required to pay the tax on

such building materials when purchased by him. The Act specifically provides that :

"Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold."

A similar provision appears in the use tax act, thus making the contractor or builder the user and consumer of building materials which are bought into the State for use or for resale in the form of real estate.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Birmingham, Alabama.

Costs and Fees—Garnishments—

Fee of clerk for issuing certificate that garnishee has been discharged or released by order of the court should be paid by party at whose instance the same is issued. Such fee is not chargeable as part of the costs.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 27, 1939, in which you request my opinion as follows:

"We had a case a few days ago in which a garnishment was run on a judgment. Later on the plaintiff dismissed the garnishment and released and discharged the garnishee. In taxing the costs we charged 75c for three releases issued to the three garnishees in the case. The plaintiff contends that he should not have to pay for these releases but if the defendant wished them he should pay cash for them, or if the garnishees wish them they should pay for them.

"It has been our custom for a number of years when the plaintiff on his own motion dismisses a garnishment and releases and discharges the garnishee to charge the release to the plaintiff. Please advise us whether we are correct in this, or should we collect 25c cash from the garnishee or the defendant at the time we issue the release? We have been advised that, while there is no specific charge for release of garnishee, we make

this charge under Section 7278 of the Code which allows the Clerk 25c for any certificate without seal not otherwise provided for."

In answer to your inquiry, I am of the opinion that there is no mandatory duty on the clerk to issue the certificate in question, and therefore same cannot be charged as part of the costs. I am unable to find any authority of law that requires the clerk to issue such certificate.

The certificate in question (a copy of which you enclose) is merely a certification of the clerk that the garnishee had been discharged and released by the order of court. The clerk may issue such certificate to anyone who desires it the same as any other certificate and charge such party a 25c fee therefor under Section 7278 of the Code of 1923, which allows the clerk 25c for any certificate without seal not otherwise provided for. In other words, the party at whose instance the certificate is issued should pay the usual fee therefor.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 16, 1939.

Hon. Tisdale J. Touart,
Judge, Inferior Criminal Court,
Mobile, Alabama.

Witness certificate—Witness certificate of attendance—Under the Local Act of the Legislature of 1907 page 82 amending the Act creating Inferior Criminal Court of Mobile. The Clerk of the Court is only authorized to issue witness certificate to such witness as demand of said clerk in advance of trial that said fees be taxed and collected for their benefit.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 3, 1939, in which you request my opinion as follows:

"Your opinion is requested on the following which I certify is necessary to the present performance of the official acts of the Clerk of the Inferior Criminal Court of Mobile:

"Acts of the Legislature (Special) 1907, page 82, Section 8—*** Be it further enacted, That witnesses in cases before the said judge of the Inferior Criminal Court shall be entitled to the same fees, to be taxed and collected in the same manner, as is provided in like cases before justices of the peace provided that said witnesses shall demand of said clerk in advance of the trial that said fees be taxed and collected for their benefit.

"Section 8729 (Code of 1923)—Witnesses are entitled to fifty cents per day while in attendance on the trial, to be taxed as part of costs.

"Is the Clerk of the Inferior Criminal Court required to charge and collect fees for witnesses in all cases before the Inferior Criminal Court, or is he required to follow the provisions of the special act (supra) and tax and collect fees only in those cases where the witnesses make demand upon him for such fees in advance of the trial for which they have been summoned?

"It has been the practice of the Cerk of this Court to follow the provisions of the Special Act since its passage in 1907 and while we feel that the Clerk has been correct in this practice we seek the opinion of your office so that this question may be definitely determined."

I note in the above inquiry you refer to an Act of the Legislature, Special Session 1907, page 82, Section 8. In this you are mistaken. The Act appears in the Local Act, Regular Session 1907, page 82. After reading the Act above referred to I am of the opinion that the Legislature has the power to regulate the mode of payment of witnesses who attend court in any case so long as it does not increase or diminish the pay fixed by the general laws of the State, and the Act you refer to does not do this. Your Local Act only says how, when and under what condition witnesses are paid for attendance in the Inferior Criminal Court of Mobile.

I am of the opinion you should follow the Local Act in issuing certificates to witnesses in this Court. The section to which I refer is Section 8 of the Act amending certain sections of the original Act, Local Acts of 1907, page 82 and is as follows:

"Section 8. Be it further enacted by the Legislature of Alabama, that Section ten (10), of an act entitled an act to establish an inferior criminal court in the county of Mobile, approved February 23d, 1899, be and the same is hereby amended so as to read as follows: Section 10. Be it further enacted, That witnesses in cases before said judge of the said inferior criminal court shall be entitled to the same fees, to be taxed and collected in the same manner, as is provided in like cases before justices of the peace, provided that said witnesses shall demand of said clerk in advance of the trial that said fees be taxed and collected for their benefit."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 17, 1938.

Hon. Frank N. Julian,
Superintendent of Insurance,
Capitol.

Insurance—Statutes—

Act No. 189, H. B. 377 approved March 3, 1937 (General Acts, 1936-37, p. 221) amending Section 2 of Act No. 687, H. B. 789, approved July

30, 1931 (General Acts, 1931, p. 819) merely adds a proviso thereto in reference to foreign insurance companies and the provisions of the 1937 Act are effective as of July 30, 1931, the effective date of the 1931 Act. The amendment became part of the original statute the same as if it had been originally contained therein.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 29, 1939, in which you request my opinion as follows:

"On July 21, 1937 the Attorney General rendered an opinion to this Department with reference to the Acts of 1936-1937, page 221, amending Section 2 of an Act of July 30, 1931, Acts 1931, page 819 etc.

"The effect of this opinion, it now develops, is penalizing domestic companies writing the type of policy mentioned in the said Acts.

"By a reference to the Act of 1931 there was established a prohibition against the further establishment of new divisions or classes, and in effect confining the indicated companies to writing of such policies in or placing such policies or certificates, etc. In other words, in 1931 all Alabama companies were prohibited from establishing any further divisions or classes, in Alabama or elsewhere.

"Since the enactment of the 1937 Act above referred to, foreign corporations are insisting that they come into Alabama and write this class of insurance because they have classes and divisions established **since 1931,** and that, therefore, under the terms of the 1936-1937 amendment, and in view of the Attorney General's opinion above referred to, they should be permitted to write this class of business to the detriment of our domestic companies, who are prohibited by the 1931 Act from so doing.

"It is obvious that the intent of the Legislature in 1931 was to prevent the opening of new divisions or classes; domestic companies adhered to this regulation, and if the opinion dated July 21st is sound, then Alabama companies are being discriminated against by reason of such opinion.

"The Bureau of Insurance is refusing license to foreign companies under the circumstances indicated on the grounds that the law is discriminating against domestic companies. We would, therefore, like to have your advices at the earliest possible time.

"I, therefore, ask that the opinion of July 21, 1937 be: Withdrawn; clarified or amended, and that you advise the rights of domestic companies in the premises mentioned."

Act No. 687, H. B. 789, approved July 30, 1931 (General Acts 1931, p. 819) provides as follows:

"Section 1. No life insurance company, mutual aid association, or fraternal benefit society, order or association operating in this State shall hereafter be permitted to issue policies, certificates or contracts to policyholders or members providing for the establishment of its policyholders or members into divisions and classes for the purpose of providing for the payment of benefits from special funds created for such purpose to the oldest member of the division and class, or to the member of the division and class whose policy has been in force the longest period of time, upon the death of a member in such division and class, except as hereinafter provided.

"Section 2. Any life insurance company, mutual aid association, or fraternal benefit society, order or association, heretofore operating on this plan in this State may continue so to do upon condition that such life insurance company, fraternal, benefit society, or mutual aid association shall not hereafter establish its policyholders, or members, into divisions or classes other than the divisions or classes actually containing subsisting policies, or certificates, when this act shall become a law; and provided that no life insurance company (including any organization of whatsoever character engaged in the writing of life insurance upon any plan) and no fraternal benefit society, order or association, and no mutual aid association, shall be permitted to operate on such endowment plan unless it have in capital stock, if a stock company, of at least One Hundred Thousand Dollars ($100,000.00), or a surplus if a mutual company, or fraternal benefit society, order or association of at least Twenty-Five Thousand ($25,000.00) Dollars, which shall be increased to One Hundred Thousand ($100,000.00) Dollars within six years.

"Section 3. In order to pay such endowments as they severally mature as well as to pay all other benefits incorporated in any such policies, certificates, or contracts of insurance, any life insurance company, fraternal benefit society, or mutual aid association now operating upon this plan in this State shall establish and maintain on each such policy a reserve upon a basis not lower than the American Experience Table of Mortality, Modified Preliminary Term, Illinois Standard, and interest assumption of three and one-half percentum covering each contingency provided for in such policy.

"Section 4. All laws and parts of laws in conflict with this act are hereby repealed."

An examination of the 1931 Act discloses that the prohibition there laid against the further establishment of new divisions or classes and in effect confining the indicated companies to the writing of such policies in or placing of such policies in divisions or classes then actually containing subsisting policies or certificates by its terms applies to such companies "operating in this State." The status of foreign companies "not operating in this State" at the time of the passage of the 1931 Act, which later came into this State, was left in considerable doubt. No express provision was made in that act with reference to any foreign company which might thereafter qualify, although it may have had in existence any number of classes or divisions in other states containing policies or certificates prior to July 30, 1931, the effective date of the 1931 Act. The 1937 amendment cured this situation by placing these foreign companies in the same position as domestic companies.

Act No. 186, H. B. 377, approved March 3, 1937, (General Acts, 1936-37, p. 221) amended Section 2 of the 1931 Act, supra. The amendment was a re-

enactment of Section 2 of the 1931 Act in its exact language with the addition of the following sentence:

> "Any foreign insurance company, mutual aid association, or fraternal benefit society, order or association, now doing business in this state, or hereafter qualified and becoming licensed in this state, shall be permitted to operate on this plan **upon the same conditions.**" (Italics supplied)

The question presented by your inquiry is whether under the terms of the 1937 amendment a foreign life insurance company can be permitted to operate on the plan based upon divisions or classes not containing subsisting policies or certificates on July 30, 1931, but which were wholly created between the date of the original act, i. e., July 30, 1931, and the date of the amendatory Act, i. e., March 3, 1937.

In my opinion, the 1937 amendment became a part of the original 1931 statute as if it had been originally contained therein. So far as regards any action after the adoption of the amendment, the statute should be construed as if it had been originally enacted in its amended form. **Allgood, Auditor v. Sloss-Sheffield Steel & Iron Co.,** 196 Ala. 500, 71 So. 724; **Pharr v. Whittle** (Ala Supreme Court M. S.); **50 Corpus Juris, 1096.**

It is true that the amendatory act, in bringing forward Section 2 of the original act and adding thereto reiterates the phrase "when this act shall become a law." That does not mean, however, March 3, 1937, the date the amendatory act became a law but rather July 30, 1931, the date the original act became a law. The case of **Allgood, Auditor v. Sloss-Sheffield Steel & Iron Co.,** supra, is analogous to the present situation.

To hold otherwise than the above would violate the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> "No state shall deny to any person within its jurisdiction the equal protection of the law."

The purpose of the amendatory act was to place the foreign company and the domestic company upon a parity. It was not the purpose of the amendment to permit the foreign company to operate based upon divisions or classes created up to March 3, 1937, while the domestic company was restricted to the divisions or classes containing subsisting policies or certificates on July 30, 1931. The Legislature never intended to give the foreign companies such a distinct and decided advantage over the domestic companies.

When the constitutionality of a statute is questioned, it is the duty of the courts and also a rule of construction, to adopt such construction as will make the statute constitutional if its language will permit. If possible, an amendment will be so construed as to uphold its constitutionality rather than to render it unconstitutional. **25 Ruling Case Law 1000; Corpus Juris, 1096.**

In my opinion, the whole effect of the 1937 amendment was to permit foreign life insurance companies, associations, etc. to operate upon the plan upon the same conditions as domestic companies, associations, etc., and that that amendment cannot be reasonably construed so as to give the foreign companies the distinct advantage over the domestic companies of basing their

classes or divisions on those in existence on March 3, 1937, while the domestic companies are restricted to the classes or divisions in existence on July 30, 1931. In other words, the foreign insurance companies which desire to qualify in this state, upon complying with all other requirements of law, may write such contingent mortality endowment contracts and classify them in divisions or classes which contained subsisting policies or certificates prior to July 30, 1931, and not March 3, 1937. As above stated, the 1937 amendment became a part of the original 1931 statute the same as if it had been originally contained therein.

The above, in my judgment, is a correct interpretation of the question presented regardless of the legislative history of the 1937 Act. The bill as originally introduced was a rewrite of Section 2 of the 1931 Act in its exact language with the addition of the following pertinent provision:

> "Any life insurance company *** shall be permitted to operate on this plan upon condition that such life insurance company *** shall not hereafter establish its Alabama policyholders or Alabama members into divisions or classes other than the divisions or classes actually containing subsisting policies or certificates on or prior to July 30, 1931."

The above was amended from the floor and finally passed in the following language:

> "Any foreign insurance company, mutual aid association, or fraternal benefit society, order or association, now doing business in this state, or hereafter qualified and becoming licensed in this state, shall be permitted to operate on this plan upon the same conditions."

In my judgment, this legislative history is not so significant as to show a different legislative intent than that shown above and that shown from the natural and normal meaning of the words employed. It may be conceded that the bill as originally introduced was more definite than the amended bill as passed, but from the reading of the whole Act is the same in each instance.

It is true that a special Federal Three-Judge Court in the case of **Liberty National Life Ins. Co. v. Read,** 24 Fed. Sup. 103, in a case involving a reciprocal statute of the State of Oklahoma, held contrary to the above. In that case the Oklahoma retaliatory statute was the main statute under consideration and the discriminatory feature regarding domestic and foreign companies in the State of Alabama was not considered or presented to the Court.

An opinion of this office rendered to the Superintendent of Insurance on July 21, 1937 (Quarterly Report of Attorney General Vol. VIII, p. 21), being in conflict with the above, is hereby overruled and withdrawn.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 17, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Costs and Fees—Judgments—Trial court has no authority to release defendant, who was convicted and fine and costs assessed against him, prior to a confession of judgment unless costs are presently paid. Sheriff who releases such defendant on order of court not responsible either civilly or criminally.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of March 16, 1939, in which you request my opinion as follows:

"Please refer to the following:

" 'State of Alabama

VS.

_____

" 'Indictment—Operating Gambling Device. On this the 9th day of March 1936, comes the State by its Solicitor and the Defendant in open Court in his own proper person and being duly arraigned and hearing the indictment against him read pleads guilty to gaming as charged therein, and the Court, upon due consideration assesses a fine of $5.00. It is, therefore, considered and adjudged by the Court that the State of Alabama recover judgment against the defendant for the sum of $5.00, the fine assessed, besides the cost of prosecution for which let execution issue.'

"and advise me as follows:

"1. On failure of the Defendant to pay the fine and costs or confess judgment for same, is it mandatory that the Court sentence such Defendant to hard labor or jail as provided in Sections 5290 and 5291, Code of 1923?

"2. Should the Sheriff hold such Defendant in custody until such fine and costs are paid and/or judgment confessed for same and/or sentence passed as provided by Sections 5290 and 5291, Code of 1923?

"3. If the Sheriff should hold such Defendant in custody, would he be liable for the fine and costs if he released him before the same was properly settled?

"4. If the Sheriff is liable for the fine and costs, would such liability be affected in any way if the Judge gave the Sheriff oral instructions to release the Defendant?

"5. Would the Sheriff be guilty of voluntary escape (Section 4004, Code of 1923) for releasing such Defendant prior to proper settlement of the fine and costs?

"6. Can such Defendant be taken into custody now and sentenced to pay the fine and costs as provided by Sections 5290 and 5291, Code of 1923?"

I am of the opinion that your first inquiry should be answered in the affirmative. When a defendant is convicted and fine and costs are assessed against him, he can either pay the fine and costs or the Court may allow him to confess judgment, with good and sufficient sureties, for fine and costs. Upon the failure to pay fine and costs or confess judgment therefor, the prisoner should either be imprisoned in the county jail or sentenced to hard labor for the county.—Sections 5290 and 5291, Code of 1923. Opinion of the Attorney General to the State Comptroller on March 15, 1939 (Quarterly Report of Attorney General, Vol. XIV, page 194). The Suspended Sentence Law of 1932 (General Acts 1932, page 54) has been held unconstitutional by the Supreme Court in **Montgomery v. State,** 231 Ala. 1, 163 So. 365. See also opinion of the Attorney General to the State Comptroller on April 22, 1939.

It follows that your second inquiry also should be answered in the affirmative. The sheriff having legal custody of the defendant should not release him until one of the above provisions have been complied with or so ordered by the court.

I am of the opinion that your third inquiry should be answered in the negative. I know of no authority of law which would render the sheriff liable for the fine and costs assessed against the defendant.

In answer to your fourth inquiry, I am of the opinion that the sheriff would be protected in releasing defendant under an order of the court whether such order be oral or written. I presume from your inquiry that the order in question was made by the judge in open court. By Section 10189, Subsection 2, of the Code of 1923, it is made the duty of the sheriff to obey all lawful orders of the court. The mere fact that the same was oral rather than written would not constitute the order an illegal or unlawful order. In **United States v. Terry,** 41 Fed. 771, 773, the court says:

"There must, in the nature of things, be an order of the court made before it is, or can be, written out in the records of the court by the clerk. When written out, the writing becomes a record of the order, and is evidence of it *** . The natural, ordinary meaning of the court includes written as well as unwritten orders, and there is no reason in the policy of the law or in the nature of things for excluding unwritten orders. Indeed, the contrary is true."

See also 50 C. J. 353 No. 63.

It is stated in 57 Corpus Juris 901, Section 518, in effect, that a prisoner who has been discharged by the order of the court having jurisdiction to make it, is a good defense to the sheriff in an action for escape, although the order was erroneously made. It is further stated in 57 Corpus Juris at Section 534 that it is sufficient for the protection of the officer that the process under

which he acts should be valid on its face, and even though the order be in fact void, if it does not carry upon its face knowledge of this fact to the officer, he is protected under it. It not appearing that the order of the court directing the sheriff to release the prisoner in question from custody was void on its face, it is my opinion, under the foregoing general rules, that the sheriff would not be liable civilly or criminally nor would he be guilty of a voluntary escape by an officer for releasing the prisoner in question. cf. Bender v. Graham Minor 269, Shelly v. Thomas 233 Ala. 227, 167 So. 316.

The above answers your fifth inquiry.

The facts are not sufficient to enable us to intelligently answer your sixth inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 17, 1939.

Hon. W. L. Borders,
Sheriff, Calhoun County,
Anniston, Alabama.

When it becomes necessary to procure the attendance of witnesses who have been summoned in any cause by an attachment against such witnesses, and such witnesses are brought into court and a judgment is rendered against them for the fine, if any, and the costs, execution must issue against such witnesses and be collected as all other civil judgments are collected.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 5, 1939, in which you request my opinion as follows:

"I would certainly appreciate your ruling in regard to the following question:

"How should a Sheriff in a county not on a salary get his pay for arresting and transporting prisoners where there has been an attachment order issued because they failed to appear in Circuit Court as a witness having been summoned according to law?

"Some few days ago I was ordered by a Circuit Judge armed with proper attachment papers issued by the Circuit Clerk to go to Gadsden, Alabama, and bring back four witnesses that had been duly summoned and failed to appear for Court.

"I asked the Circuit Judge how I was to get my pay and he said he did not know of any way where the defendants were insolvent."

I am of the opinion that the information given you by your Circuit Judge is correct.

I refer you to Sections 3827, 5629, 5630, 7739, and 7740 of the Code of Alabama, 1923.

It is my judgment that such a proceeding against a defaulting witness is civil in its nature and that where a judgment is taken against a defaulting witness, if there is a judgment for costs, you may recover for your services from the defendant, but if the defendant is insolvent, I know of no funds from which you may be paid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 17, 1939.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Birmingham, Alabama.

Witnesses—Fees—

State witnesses in criminal cases also entitled to receive fee for attending certain quasi criminal cases on same day. (Section 3770, Code of Alabama, 1923, as amended by Act No. 34, H. 96, approved February 17, 1939 and Section 7236).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 1, 1939, in which you request my opinion as follows:

"In recent weeks a bill was passed in the Legislature sponsored by Representative Hodo, from this County. This bill, I understand, amended Section 3770, dealing with witness fees against the State in criminal cases, so as to bar a witness for the State from claiming in more than one case for the same day.

"The question arose as to whether or not this amendment to section 3770 would have any effect on the right to claim attendance of witnesses in quasi criminal cases which are claimed under section 7236, dealing with

witness fees in civil cases, which if collected are collected from the defendant. I, therefore, request you to advise me, as Clerk of the Circuit Court, whether or not I can issue a witness claim to a state witness and also issue a claim to the same witness for attendance for the same day in a quasi criminal case. The majority of said quasi cases being cases appealed from Recorder's Court of the City of Birmingham."

The amendment to Section 3770 of the Code of Alabama, 1923, to which you refer is as follows:

"FEES TO STATE WITNESSES WHEN SUBPOENAED IN MORE CASES THAN ONE:—A witness for the state attending in more criminal cases than one on the same day, shall only be entitled to fees in one case, to be selected by him while so attending." (House Bill 96, No. 34, approved February 17, 1939).

You will note that the limitation of a fee in one case only is as to those witnesses for the State attending in more "criminal" cases than one on the same day. There is no limitation as to the amount of fees a witness might receive for services in other than criminal cases by this particular act. Thus, a witness might attend in several criminal cases on the same day and under the code section, as amended, would be entitled to receive only one witness fee but if during the day he also attended a civil case or a quasi criminal case, then, in my opinion, he would be entitled to a fee in that case also.

A quasi criminal case is not a criminal case. A "quasi crime" is an offense not constituting a felony or misdemeanor at law, but which is in the nature of a crime. It includes a class of offenses against the public which have not been declared crimes, but wrongs against the local or general public proper to be repressed or punished by forfeitures and penalties. **Southern Railway v. McNeely,** 88 N. E. 710 (Ind); **Pittsburgh C & C St. L. R. R. Co. v. Ferrell,** 78 N. E. 988, 995; Bouv. Dict. Title "Quasi Crimes".

Included in this class of cases are prosecutions for violations of municipal ordinances which have uniformly been held quasi criminal in nature. See 15 Ala. Dig., Mun. Corp. Key No. 635.

Section 3770, as amended, deals particularly with witnesses in **criminal cases.** It does not apply to witnesses in those quasi criminal cases where the fees are paid as provided in Section 7236.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 17, 1939.

Hon. Chris J. Sherlock,
State Highway Director,
Capitol.

Highway Department—

Contractor under contract to remove buildings from the right of way acquired by the Highway Department for Highway purposes may be held liable for damages accruing to property owners through improper removal of said buildings.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 9, 1939, in which you request my opinion as follows:

"Re: F. A. P. 27 Reopened F. A. P. 144—Sec. 1 & 2 Proposal B—Lauderdale County Contract on Moving of Structures Off Right of Way

"Herewith enclosed copy of contract, performance and material bonds and specifications of this Department covering the contract of Mr. J. R. White for the removal of structures on the above project. In the removal of these structures the property owners are not satisfied as to the condition the property is now in as a result of being moved by Mr. J. R. White and there has been an attempt to remedy this situation by Mr. White, but he claims that the only way this matter can be settled is by permitting the property owners to sue him on his bond.

"By the Contractors' Advertising and Bonding Act, found on pages 70-72 of the 1935 General Acts of Alabama, it would appear that suit could not be entered on the bond until the job is advertised as completed and that brings this point—

"If this Department makes its final construction inspection and authorizes the contractor to advertise his job as being completed, then—in the event that this was done—would the property owners have the right to bring suit against Mr. J. R. White on his bond or would the fact that the Highway Department approved this work release Mr. White and the Bond Company from further liability and therefore place the suits of the property owners against the Highway Department and not Mr. J. R. White and his bondsman.

"As you will note from the bonds, the performance bond is made out to the State Highway Department of Alabama, and would an individual whose property has been moved under this contract be permitted to sue the contractor and his bondsman under this type of bond, or would he of necessity have to file his claim against the State Highway Department to secure redress for his injury?

"Please advise the Department as to the above?"

In my judgment, the fact that the Highway Department inspects and approves the work herein contemplated, as finished, can in no manner affect the liability of the contractor on his performance bond for any negligent acts, nor render the Highway Department liable therefor.

The contractor may have performed the services contracted for to the point of completion of the contract and yet have done the work in such a negligent manner as to give rise to causes of action against him by third persons injured thereby. The contractor alone, however, would be liable for his negligent acts when the nature of the work itself is not intrinsically dangerous.

See **So. Railway Co. v. Lewis,** 51 So. 746, 165 Ala. 555, 183 Am. St. Rep. 77.

The fact that the contractor's bond is made payable to the State would not prevent a third person injured by the negligent acts if said contractor from suing on the bond, even though the Highway Department should authorize the contractor to advertise the work as finished.

The premises considered, it is my opinion that the Highway Department may inspect the work and authorize the contractor to advertise his work as completed without relieving the contractor of liability on his bond, or incurring liability for the negligent acts of the contractor.

The road contractor's bond is liable to cover all agreements for construction and completion, and under the terms of your contract, the contractor's bond would be liable for the damages suffered by the third persons here contemplated.

See **Levy v. U. S. Fidelity & Guaranty Co.,** 68 Fed. (2nd) 329; **U. S. Fidelity & Guaranty Co. v. Andalusia Mfg. Co.,** 134 So. 18, 222 Ala. 637.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 20, 1939.

Dr. J. N. Baker,
State Health Officer,
Capitol.

1. County is a creature of the State with such powers as are conferred upon it.

2. Legislature in the exercise of its police powers may authorize counties to regulate and install privies, water closets and septic tanks.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of February 23, 1939, in which you request my opinion as follows:

"Please advise me if the Legislature has the authority to confer upon county governments the right to install a privy, water closet or septic tank on private property and assess the charge therefor against the property owner, as contemplated in the attached bill now in the Senate."

The proposed Bill about which you make inquiry reads as follows:

"To regulate privies, water closets and septic tanks, and the construction thereof, and to compel the installation of same, and the connection of such water closets with such septic tanks, or with the sewerage systems of the county; and, in case of failure to install or connect after reasonable notice, then the county may install proper privies, water closets, or septic tanks, as it deems advisable, and connect such water closets with such septic tanks or with the sewerage system of the county, the expense of same to be assessed against the property, and the cost thereof to be a lien upon the property in favor of the county, superior to all other liens, to be collected as other debts are collected or liens enforced. When privies, water closets, or septic tanks are installed and connections made by the county under the provisions of this section, the Board of County Commissioners, Board of Revenue, or other governing body of the county, shall prepare a statement, in writing, setting forth the name of the owner, and a description of the property upon which the improvements have been made, together with the cost of the installation of such privies, water closets, or septic tanks, and sanitary connections, which must be signed by the president or chairman of the Board of County Commissioners, Board of Revenue, or other governing body of the county, in his official capacity, and filed with the probate judge in the county in which such property is situated, for record in the mortgage records of the county. The filing of such statement shall operate as notice of such lien from the date of its filing.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. PRIVIES, WATER CLOSETS, SEPTIC TANKS AND CONNECTIONS WITH SEWERAGE. To regulate privies, water closets and septic tanks, and the construction thereof, and to compel the installation of same, and the connection of such water closets with such septic tanks, or with the sewerage system of the county; and, in case of failure to install or connect after reasonable notice, then the county may install proper privies, water closets, or septic tanks, as it deems advisable, and connect such water closets with such septic tanks or with the sewerage system of the county, the expense of same to be assessed against the property, and the cost thereof to be a lien upon the property in favor of the county, superior to all other liens, to be collected as other debts are collected or liens enforced. When privies, water closets, or septic tanks are installed and connections made by the county under the provisions of this section, the Board of County Commissioners, Board of Revenue, or other governing body of such county, shall prepare a statement, in writing, setting forth the name of the owner, and a description of the property upon which the improvements have been made, together with the cost of the installation of such privies, water closets, or septic tanks, and sanitary connections, which must be signed by the president or chair-

man of the Board of County Commissioners, Board of Revenue, or other governing body of such county, in his official capacity, and filed with the probate judge in the county in which such property is situated, for record in the mortgage records of the county. The filing of such statement shall operate as notice of such lien from the date of its filing.

"Section 2. Nothing in this Act shall be construed to repeal any of the provisions of Section 2051 of the Code of 1923, as amended by Act No. 443, approved September 13, 1935.

"Section 3. This Act shall be effective on its approval by the Governor."

It must be kept in mind that a county is a creature, unit or political subdivision of the State and is endowed with such powers and authority as are granted to it by the State.

Yielding, vs. State 232 Ala., 293; 167 So., 580.

State, vs. Bowles, 217 Ala., 458; 116 So., 662.

The police power of the State is not subject to definite limitations, but represents the State's reserve power to safeguard and protect the health, safety, morals and general welfare of its citizens.

Ex Parte Rowe, 4 Ala. 254; 59 So., 69.

Franklin, vs. State, 232 Ala., 637; 169 So., 295.

The legislature has the authority to delegate to boards, agencies and commissions of its own creation various governmental powers and authority for the more efficient administration of its laws in protecting and safeguarding the health, safety, morals and general welfare of its citizens.

Pake, vs. Bradley, 204 Ala., 455; 86 So., 28.

Oliver, vs. State, 16 Ala. App., 533; 79 So. 313.

Thus it seems that a county is a governmental agency exercising only such powers as are conferred upon it by the state, and that under its police powers a state may grant to a county such authority and powers as will best preserve and protect the health, safety and morals of its citizens. In doing this, however, the due process provision of the Constitution must be observed. In the making of assessments or charges against property, it has been held necessary in the observance of this due process provision to provide for reasonable notice to the owner, giving him an opportunity to appear and protest against the assessment or charge before they become final, and to provide for the right of appeal from such assessment or charge.

Jasper Land Co., vs. State of Jasper, 220 Ala., 639; 127 So., 210.

Hamrick, vs. Town of Albertville, 219 Ala., 465; 122 So., 448.

Your inquiry must be answered in the affirmative. That is, the legislature has the authority to confer upon county governing bodies the power and authority to regulate privies, water closets and septic tanks, and compel the installation of the same, and in the event same are not installed, upon proper notice, for the county to make such installation and charge the same against the property. That upon making the charge, notice shall be given by the county to the owner giving him the right to appear and protest against the same with the further right to appeal from such charge and assessment and providing that when the charge or assessment becomes final that it shall be a lien against the property.

The Bill submitted by you which is incorporated herein seems to be rather vague and indefinite in respect to the authority and power granted to county governing bodies. It is suggested that the Bill should begin by reading as follows:

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That boards of revenue, courts of county commissioners or other like governing bodies are hereby authorized and empowered to regulate privies *** ."

In order that no question of the due process provision of law may be raised, it is further suggested that the Bill should contain a provision whereby the property owner will be notified of the charge or assessment and given the right to appear and protest against the same when the work is done by the county, and that said provision give the owner a right of appeal from said charge or assessment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 20, 1939.

Hon. G. W. Cuninghame,
Register, Marengo County,
Linden, Alabama.

Registers in Chancery—Methods of service—

1. Section 9447 of the 1923 Code provides an additional method of perfecting service to that provided for by Chancery Court Rule No. 22.

2. Under Section 9447 of the 1923 Code, service may be had on a nonresident when his address is known by registered mail.

3. Section 9445 of the 1923 Code provides for alternate or dual modes of service.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion which is as follows:

"Please advise your construction of Section 9447 of the Code. What I want to know is whether or not it is necessary to advertise in cases mentioned in this Section or whether all that is necessary is to notify by registered mail. I think it is clear that you must advertise by publication in cases where party is non-resident, but address is unknown, but in cases where they are non-residents with Post Office address given in a copy of bill or petition and summons requiring an answer in 30 days all that is necessary if given by registered mail to be delivered only to party to whom addressed with return receipt demanded? I also refer you to rule 22 under Chancery Rules and practice page 914 Code of 1923. Please advise me fully with reference to how I should proceed in each case mentioned in above references."

From the nature of your inquiry, it appears that you are confused over the provisions of Section 9447 of the Code of 1923 and Chancery Court Rule No. 22, and desire a construction of them.

Section 9447 of the 1923 Code and Chancery Court Rule No. 22 read as follows:

"9447. Process issued and sent by officer to the defendant by registered mail.—When such affidavit sets forth the name, place of residence and post office address of the defendant and such defendant is over the age of eighteen years, a copy of the petition, complaint, bill of complaint, or if the suit is commenced by attachment, a copy of the writ of attachment with the return of the officer executing the same, and of the complaint filed in the cause, together with a summons to answer, plead or demur to such petition, complaint or bill of complaint within thirty days from the service thereof as provided herein shall be issued and sent to the clerk, register, justice of the peace, or judge of the court in which the proceeding is pending, to such defendant by registered mail, postage prepaid, marked 'For delivery only to the person to whom addressed,' and return receipt demanded, addressed to the sending officer."

"22. Service of nonresidents.—Where a defendant is shown by affidavit of the complainant or his agent, appended to the bill, or otherwise to be, in the belief of such affiant, either a nonresident, or that his residence is unknown, or, if a resident, that he has been absent from the state more than six months from the filing of the bill, or that he conceals himself so that process cannot be served upon him; and such affidavit further states the belief of the affiant as to the age of the defendant, being over or under twenty-one years, or, if the residence and age of the defendant are unknown to the person making the affidavit, states that they are unknown, or, if the bill sets forth the facts required to be stated in said affidavits, and is sworn to, it shall be the duty of the register, or chancellor, to make an order against such defendant, requiring him to answer or demur to said bill before a day to be therein named, not less than thirty days or more than fifty days, from the making thereof. The register shall have all orders of publication against defendants, whether made by the chancellor or himself, published, with as little delay as may be, in such newspaper as may be designated in the order once a week for four consecutive weeks, a copy of which order he must post up at the door of

the courthouse of the county, or other place where the court sits, and shall send by mail another copy thereof to the defendant, where his residence is shown by the bill or affidavit, as aforesaid; which copies shall be posted up and sent by mail, within twenty days from the making of said order."

It will be noticed under Rule No. 22 that among other things it provides that when it is shown the defendant is a **nonresident** that service may be perfected by publication, and followed by mailing a copy of the order of publication to the defendant if his address is known. This rule refers to **all** cases in which it is shown that the defendant is a nonresident.

Under the provisions of Section 9447 of the Code, when the address of a nonresident is given, service may be had by registered mail as therein provided. This brings about an apparent conflict, since Chancery Rule No. 22 seems to apply to **all** cases in which the defendant is a nonresident and Section 9447 provides for service by registered mail on nonresident when the address is known.

This apparent conflict is eliminated when we remember that Section 9447 was enacted after Chancery Rule No. 22 had been in operation for many years and that said section provides an additional method of perfecting service. **Wilkerson vs. Wilkerson,** 230 Ala. 567, 161 So. 820.

Section 9445 of the 1923 Code reads as follows:

"Section 9445. Alternative or dual modes of service of process and of notice to non-residents and infants; effect of.—There shall be no objections to service of process or notice to litigants, that two or more modes of service or notice are provided for by law; but service of notice perfected in any manner or mode which is provided for by law shall be deemed sufficient, notwithstanding other modes or manner of service and notice are provided by law."

and provides for alternate or dual modes of service.

It is my opinion that Section 9447 of the 1923 Code provides an additional method of perfecting service upon nonresidents to that provided by Chancery Court Rule No. 22, and that under the provisions of Section 9445 either of the two methods may be used.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 20, 1939.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Mortgages—Filing Tax—

1. Instrument given in security of mortgage already filed not subject to filing tax.

2. Instrument not purporting to transfer any interest in real or personal property is not a mortgage within the purview of Schedule 94, Revenue Acts of 1935.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your request for official opinion under date of March 13, 1939, which is as follows:

"We hand you herewith copy of a paper offered for record in this office, and there seems to be some question as to whether or not a mortgage tax should be charged on this paper.

"Acting on the theory that this is nothing more than additional security, we, of course, realize that there would be no mortgage tax, but, if the original mortgage is not paid, and Hatchett Chandler, who signs this paper should be called on to pay the $2100.00, and would then have the right to foreclosure, this, of course, would be termed a second mortgage and would, therefore, carry a mortgage tax.

"We are now submitting the paper to you for interpretation."

With your permission I will analyze the proposition at hand before beginning an answer to your propounded inquiry.

It seems that one Rutson L. Holmes loaned to one Lucy T. Hatchett a sum of money, namely, $2,100.00. This loan was secured by a mortgage on certain property belonging to Lucy T. Hatchett. As additional security for this mortgage Hatchett Chandler has signed an instrument containing his promise to pay the sum mentioned above upon the failure of the mortgagor Lucy T. Hatchett, to pay same. This subsequent instrument is to be filed and the question presents itself as to whether this constitutes a mortgage, deed of trust, contract or conditional sale or other instrument of like character requiring filing tax.

Schedule 94 of the Revenue Law of 1935, found on page 260 of Simon's Code, reads in pertinent part as follows:

"No mortgage, deed of trust, contract of conditional sale or other instrument of like character which is given to secure the payment of any

debt which conveys any real or personal property situated within this state, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before same shall be offered for record *** ."

This instrument is clearly without all the classifications set out above with the possible exception of a mortgage or other instrument of like character.

We will first determine whether or not this is a mortgage. No instrument can be considered a mortgage in which there does not exist both the right to foreclose and the reciprocal right to redeem. **Southern Building Association v. McCants,** 120 Ala. 616, 25 So. 8.

A mortgage conveys an estate to the mortgagee which entitles him to the immediate possession of the property unless otherwise stipulated in the conveyance. **Crabtree v. Price,** 212 Ala. 387, 102 So. 605; **Dallas Compress Co. v. Smith,** 202 Ala. 193, 79 So. 565; **Trannon v. Towles,** 200 Ala. 82, 75 So. 458, and cases cited in Footnote 14, 41 Corpus Juris, 276.

It appears therefore that none of the conditions above are apparent in the instrument at hand. Therefore, it is my opinion that the instrument under consideration is not a mortgage and hence cannot be subject to the mortgage tax upon that basis.

We now come to the proposition as to whether or not the instrument is "of like character" to a mortgage to the extent of bringing it within the purview of the filing tax required under Schedule 94, supra. It will be noted that under Subsection (d) of Schedule 94, supra, the following exemptions are set out:

"The privilege taxes required by law to be paid on mortgages, deeds of trust and similar instruments shall not be required on or for the filing of any instrument providing any additional or substantial security for any indebtedness secured by an instrument previously filed upon the filing of which the taxes provided by law have been paid, or which was filed at a time when no such privilege taxes were required by law, provided the secured indebtedness remains unchanged in amount and in time of maturity."

It appears, therefore, that this instrument which clearly is additional security for the mortgage presumably already filed, is not subject to a filing tax under this Schedule. In an opinion to Hon. G. P. Butler under date of March 4, 1927, found on page 175 of Biennial Report of the Attorney General, 1926-28, it was held that "If the second mortgage is simply to secure the same debt, payable at the same time as in the first mortgage, then there is no filing tax upon the second mortgage given as additional security." See also opinion to Hon. Eugene H. Hawkins under date of April 27, 1937, page 63, Quarterly Report of Attorney General, Vol. VII. It would appear, therefore, that even though the instrument in question be a second mortgage, that it would not be subject to the filing tax mentioned, supra.

It is therefore my opinion that the instrument in question is not a mortgage or instrument of like character coming within the purview of the statute requiring a filing tax.

Substantially the same proposition as presented here was ruled on by this office in an opinion to Hon. W. G. Little under date of January 5, 1937, found at page 8, Quarterly Report of Attorney General, Vol. VI, where it was stated: "Specified agreement which conveys no interest in real or personal property is not subject under either Schedule 46 or Schedule 94 of the 1935 Revenue Act."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 20, 1939.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation—Newsprint paper—

Original packages imported by publishing company from Canadian and Finland points held not subject to ad valorem taxes under facts stated.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 10, 1939, in which you request my opinion as follows:

"A local newspaper is claiming exemption from ad valorem taxes on newsprint paper in original packages imported from Canadian and Finland points.

"As a basis for this claim they cite Article 1, Section 10 of the Constitution of the United States that, 'No State shall, without the consent of Congress, pay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspections laws.'

"For the interpretation of this provision they call to our attention certain U. S. Supreme Court Decisions in several cases such as: 'Brown v. Maryland (12 Wheat. 419) decided in Jan. 1827' and 'Norfolk & Western Railway Co. v. Sims (191 U. S. 441) decided Dec. 7, 1903.

"This newspaper in a letter to this office states that all of their newsprint stock for the past year or longer has been shipped from Canadian or Finland points.

"Will you please render an opinion as to whether or not this claim of exemption should be allowed?"

Upon further investigation of the facts connected with your inquiry, I find that the publishing company inquired about has contracted with a supply company, an Ohio corporation, which has agreed to furnish it such newsprint as may be desired from time to time. I find from the contract which has been carefully studied that the publishing company is absolute owner of all such paper from and after the delivery of such paper to the railroad or other carrier consigned to said publishing company. It thus appears that the publishing company is in fact the "importer" of the newsprint stock.

It further appears that at the mill, whether Canadian or Finnish, the paper is put up in rolls of various lengths and diameters, according to specifications furnished to the mill by the purchaser. Each roll is wound on what is called a "core", which may be either of heavy cardboard with aluminum tips to fit into the press; or of wood with iron tips. Each roll, of whatever length or diameter, is wrapped with a sheet of much heavier and stronger paper which covers both the length and the diameter. The joints of the wrapper and edges of the roll are covered with wide heavy paper strips glued to the heavy wrapper. A sticker showing the name and address of the mill manufacturing the paper, the number of the roll, its length and diameter, the weight of the core (where wooden cores are used) consignee and other essential data, is pasted or glued onto the curved side of the roll, near one end, and the roll is then ready for shipment. The weight stamped on each roll includes the weight of the wrapper, and, where so-called "non-returnable" cores are used, that is cardboard cores, also the weight of the core. No allowance is made by the mill to the purchaser for either the core or wrapper. If returnable cores are used, that is, wooden cores with iron or metal tips, the weight of the core is deducted from the gross weight of each roll, and the net weight only of the paper in the roll is paid for. The price of the wood cores is not included in the cost of the paper. A separate so-called "core account" is kept, covering such wooden cores, and if the core is returned to the mill in good condition, allowance at specified rates is made for such returned core in such account, which is settled periodically.

The marked and wrapped roll is then loaded into steamer, as to all paper received from Finland sources, and unloaded either at New Orleans or Mobile, as may be specified. Paper received from Canadian sources may move either by water or rail, depending upon the time of the year, and whether or not navigation is open on the Great Lakes. The number, weight and size (length and diameter) of each roll is entered on a "roll list" which accompanies each bill of lading and invoices covering each shipment from the mill. Copies of these roll lists are furnished to the purchaser and to the publication for which the shipment is destined. Upon arrival at Birmingham, the roll is either stored at the taxpayer's publication office, if space is available therefor, or if no such space is available, in private or state warehouses, from which rolls are withdrawn from time to time as space becomes available in the taxpayer's plant in Birmingham. Every effort is made to use each shipment completely before the next shipment or lot is used. Rolls from each shipment are kept in separate and distinct lots, both in the warehouses and in the publication plant; that is, rolls received in one shipment are not mingled with rolls received in a subsequent shipment, but are stored in separate lots or piles, until required for use on the press. From time to time as required, rolls are removed from the place of storage at the taxpayer's plant to a point in or near the pressroom of the taxpayer. A few days' supply of rolls is kept on hand near the press at all times. When a roll is to be used, it is placed on a so-called "reel" at one end of the press, and the wrapper, which was placed on the roll at the mill, and has been on the roll continuously since that time, is then removed from the roll. The outer end of the strip of newsprint is then

pasted or spliced to the inner end of the almost consumed roll then on the press, and the new roll is read for consumption. Throughout the entire period of transportation from the mill to the press reel, however, each roll retains the heavy wrapper placed on it at the mill, with its descriptive sticker, and is treated as a separate piece or package in all records pertaining to the shipment, being identified by the roll number stamped on the wrapper. In no case are two or more rolls of any length fastened together, since to do so would result in damage to the paper in each roll, despite the heavy wrapper on each one, and thus make the paper unfit for use on the press.

It appears from the foregoing facts that each roll so wrapped constitutes an "original package."

Article I, Section 10, of the Constitution of the United States provides that:

> "No state shall, without the consent of Congress, lay any imposts or duty on imports or exports except what may be absolutely necessary for executing its inspection laws," etc.

The simple question presented for consideration is whether these imported rolls of paper are subject to state taxation while remaining in the original packages, unbroken and unsold, in the hands of the importer.

The decision of the Supreme Court of the United States in the case of **Brown v. State of Maryland,** 12 Wheat. 419, 441, furnishes the answer to the question. In that case the question arose as to whether an act of the legislature of Maryland requiring importers of foreign goods by the bale or package, to pay the State a license tax before selling them in the form and condition in which they were imported, was valid and constitutional. The court held the act in conflict with the provision of the Constitution which declares that no State shall, without the consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws.

In the elaborate opinion of Mr. Chief Justice Marshall the whole subject of the power of Congress over imports is considered, and the line marked where the power of Congress over the goods imported ends, and that of the State begins, with as much precision as the subject admits. After observing that the prohibition of the Constitution upon the States to lay a duty on imports, and their acknowledged power to tax persons and property may come in conflict, he says, speaking for the court:

> "The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In that case it was also held that the authority given to import necessarily carried with it a right to sell the goods in the form and condition, that is, in the bale or package, in which they were imported; and that the execution of a license tax for permission to sell in such cases was not only invalid as being in conflict with the constitutional prohibition upon the States, but also as an interference with the power of Congress to regulate commerce with foreign nations.

The reasons advanced by the Chief Justice in the Brown v. Maryland case have received recognition and approval by the Supreme Court of the United States in repeated instances. Mr. Chief Justice Taney, who was at the time eminent at the bar, as he was afterwards eminent on the bench, argued the case on behalf of the State of Maryland; and in the license cases (5 Howard 575) he referred to his position and observed that, at that time, he persuaded himself that he was right, and thought that the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. "But farther and more mature reflection," the great judge added, "has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things the line of division is, in some degree, vague and indefinite, and I do not see how it could be drawn more accurately, and correctly, or more in harmony with the obvious intention and object of this provision in the Constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought in the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State government."

Mr. Justice Field in **Low v. Austin,** 13 Wallace 29, in holding that the State of California was without authority to impose ad valorem taxes on certain wines imported into California and stored in a warehouse in San Francisco, concluded:

> " *** the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to State taxation, the extent and the character of the tax are mere matters of legislative discretion."

In view of the foregoing authorities, I am constrained to hold that newsprint stock imported and stored as detailed in your inquiry would not be subject to ad valorem taxes so long as the same were held by the importer in the original package and not commixed or commingled with the other newsprint stock so imported and used by it.

Cf. Opinion of the Attorney General rendered to the State Tax Commission under date of June 29, 1931, (Opinions of the Attorney General, Office Edition, Vol. IV, page 388) copy of which is herewith enclosed for your convenience.

Of course, and I understand that this is admitted by the taxpayer, the broken rolls and stubs of newsprint paper, which I understand are also stored in the warehouse, would be subject to ad valorem taxes, it being apparent that the original package, the original roll, has been broken and the newsprint stock made a part of the taxable personalty of this State.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 20, 1939.

Hon. L. G. McPherson,
Clerk, Circuit Court,
DeKalb County,
Fort Payne, Alabama.

Costs—Clerk without authority to issue execution against defendant who prevailed in an appeal in quo warranto proceedings.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 13, 1939, in which you request my opinion as follows:

"I am enclosing a copy of a bond in the case styled State of Alabama Upon the Relation of H. G. Bailey, Solicitor of Ninth Judicial Circuit, Plaintiff, versus R. M. Ferguson, Defendant, which case was reversed and rendered by the Supreme Court. Now, may I, as Circuit Court Clerk, issue execution against this bond for the appeal cost?"

The bond which you enclosed is the usual appeal bond conditioned to pay the costs of said appeal.

I presume that the case to which you refer is that of **Ferguson v. State, ex rel Bailey,** 27 Ala. App. 337, 172 So. 350, which was reversed by the Court of Appeals on February 2, 1937. In my opinion you may not issue execution against the appeal bond executed by the defendant for the costs on appeal. **Ham v. State ex rel. Buck,** 172 Ala. 239, 54 So. 996. The proceeding against Ferguson was a quo warranto on the relation of the Circuit Solicitor.

It will be noted that the Court of Appeals reversed the judgment of the lower court and rendered a judgment therein in favor of the appellant but without rendering a judgment for costs and for good reason in that it is well settled that costs are not adjudged against the State where the State fails to prevail on appeal in such cases; **State ex rel. Pollard v. Brewer, Auditor,** 59 Ala. 130; **Dawson v. Matthews,** 105 Ala. 485, nor against a State officer without a personal interest. **Reynolds v. Blue,** 47 Ala. 711.

Under Stction 7263 of the Code it is provided:

"The clerk of the *** court of appeals, upon return of an execution 'no property' against the defendant by the proper officer *** of the county from which the case was brought, may issue execution against *** appellant and sureties *** for the costs actually created by *** appellant but for none other, to be collected and returned as other executions."

Since no execution might legally be issued against the State, or against the Solicitor, who in this instance is a State officer without a special interest, it is obvious that there could be no return of an execution "no property found" against the defendant. In the absence of such a return, there is no authority of law for levy of an execution against the defendant on his bond. Cf. Opinion of the Attorney General, Biennial Report of Attorney General, 1934-36, page 750.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 20, 1939.

Hon. John S. Pollard,
Tax Collector, Dallas County,
Selma, Alabama.

Assessment—Property should be assessed in name of purchaser at municipal tax sale.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of March 2, 1939, which is as follows:

"Please let me have your opinion on the following state of facts:

"A mortgage is made to the Home Owners Loan Corporation by a citizen of Selma. The taxes are not paid the City of Selma on the property and the property is sold to the City for City taxes. The Home Owners Loan Corporation pays to the City of Selma the amount of money for which the property sold and takes a deed from the city. I attach a copy of the deed to this letter.

"It appears to me that the legal title to the property is now in the Home Owners Loan Corporation by virtue of its deed, and the property should be assessed to the owner, the Home Owners Loan Corporation.

"Please advise as to whether the property should be assessed to the Loan Corporation or to the citizen who originally made the mortgage?"

I am of the opinion that the property referred to in your inquiry should be assessed to the Home Owners Loan Corporation. Section 2130 of the Code of Alabama, 1923 reads as follows:

"Section 2130. Tax sale; title of.—The purchaser of property, real or personal, sold under an execution issued by the city or town clerk, shall receive a title clear of all incumbrance, except of liens held by the state and county, provided the property sold is the property against which the taxes for the payment of which the sale is had were levied."

It is seen from this section that on the sale of this property for taxes the city received a title clear of all incumbrance except liens held by the State and County, and subject to the statutory right of redemption. However, subject to these limitations, the clear legal title was in the city and was transferred by deed to the Home Owners Loan Corporation, and said property should be assessed in the name of the Home Owners Loan Corporation. Quarterly Report of Attorney General, Vol. III, page 134.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 22, 1939.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Land Agents—

Land Agent of Jefferson County, under contract held by him with the State Land Commissioner, not entitled to any percentage on moneys received after his tenure as Land Agent from redemptions of property that had been purchased by the state at tax sale, even though the redemptions were secured through his efforts during his tenure as such Land Agent.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 20, 1939, in which you request my opinion as follows:

"I have read with interest your opinion to Probate Judge W. W. Hill of Montgomery relative to Land Agent Patterson of that County being entitled to commissions on deferred payments made on property redeemed by installment during his term of office, but which payments may be made after his term has expired.

"The situation in Jefferson County is slightly different, and I request your opinion as to the situation here. Mr. A. F. Lindbergh was appointed Land Agent for this County and served until February 1st, 1939. At the time of his appointment some question was raised by some of the parties in interest as to whether a ten percent allowance to him of all money secured by redemptions would be reasonable. In order to obviate any question about this an agreement was made allowing Mr. Lindbergh $20,000.00 per year out of commissions for the payment of the expenses of his office. The agreement was submitted to the Circuit Court for declaratory judgment as to whether it was reasonable. Judge Fritz Thompson in a decree held the agreement reasonable. I attach hereto as exhibit 'A' a copy of the judgment of the Court which embraced the agreement.

"As I understand, along in July, 1936, the State Land Commissioner, with the approval of the Governor, altered the agreement in question and approved by Judge Thompson by allowing Mr. Lindbergh the same amount of $20,000.00 per year, but with the understanding that he would not be bound by the $250.00 allowance as salary and would not be required to refund anything to the State Treasury in case of a balance. I attach hereto as part of this request a letter written by Lindbergh to Mr. Henry S. Long, former State Land Agent, dated January 31st, 1939, together with Mr. Long's reply thereto dated February 1st, 1939. Mr. Lindbergh informs me that since July, 1936, he acted pursuant to the new agreement, which, though not in writing, was made with him by Mr. Long, the then State Land Commissioner and Governor Bibb Graves.

"I would thank you to give me your opinion as to whether Mr. Lindbergh will be entitled to his ten per cent of commissions on redemptions on the installment plan effected during his term of office but the payment on which may be made subsequent to the expiration of his term of office. In other words, is he entitled, as in the Patterson case, to ten per cent of installment payments made subsequent to the expiration of his term of office on redemptions effected during his term?

"For your information, I enclose copy of letter from Mr. Curry relative to the matter. Mr. Lindbergh does not agree with the opinion of Mr. Curry.

The copy of the judgment of the Circuit Court of Jefferson County, which embraces the original contract entered into by the Land Agent of Jefferson County and the State Land Commissioner, which judgment held such contract to be valid; the copy of the letter from the then Land Agent of Jefferson County to the former Chairman of the State Tax Commission under date of January 31, 1939; the copy of the letter from the former Chairman of the State Tax Commission to the then Land Agent of Jefferson County under date of February 1, 1939; and the copy of the letter from the Commissioner of Revenue to you under date of February 8, 1939, all of which were attached to your letter of inquiry, have been examined by me. While the contract between Mr. Long, the then State Land Commissioner, and Mr. Lindbergh, the then Land Agent of Jefferson County, which was approved by the then Governor of the State of Alabama, on October 1, 1935, may have been subsequently altered or changed in certain respects, it does not appear from any information before us that the proviso that Mr. Lindbergh was to receive 10% of the proceeds of sales and redemptions of land which had been purchased by the state at tax sale, not to exceed 20,000.00 per annum, was ever altered or changed. It is this proviso in the contract with which we are presently concerned.

I quote from the contract in pertinent part:

"For which services the said A. F. Lindbergh shall receive ten percent (10%) of the proceeds of such sales and redemptions; provided, however, that said 10% shall not exceed the sum of $20,000.00 per annum and that when the said sum of $20,000.00 per annum shall have been paid to said Lindbergh that no further deductions shall be made from sales, redemptions or rentals but that the entire proceeds of such sales, redemptions or rentals shall be distributed as provided by law."

It is my opinion that the Land Agent of Jefferson County, under this contract from which I have quoted in pertinent part, is not entitled to any percentage on moneys received after his tenure as Land Agent from redemptions of property that had been purchased by the state at tax sale, even though the redemptions were secured through his efforts during his tenure as such Land Agent.

The act under which this contract was made is Act No. 440 (General Acts 1935, p. 916) approved September 13, 1935. It reads in pertinent part:

"Section 1. The State Land Commissioner, with the approval of the Governor, may contract with some person or firm in each county of this State to investigate sales of real property for taxes and bid in for the State, to notify parties at interest in such real estate of such sales, to secure redemptions on said property, to secure sales of said property subject to sale at private sale by the State.

"Section 2. For such services rendered under the preceding section, the State Land Commissioner may allow fair compensation, to be fixed in the contract, which shall not exceed 10% of the proceeds of such rent, sale or redemption, and shall be paid from the funds so received."

Thus it can be seen that the Land Commissioner could have contracted with the Land Agent of Jefferson County in such a manner as to allow him a percentage of the proceeds of the rentals, sales or redemptions secured by him not to exceed 10% of the same or that he could have contracted with him to allow him any amount less than 10%. The 10% was not a fixed compensation but was only the maximum which could be fixed. Therefore, the rule "that the acceptance of less compensation than that established by law for any official service does not estop that official from subsequently recovering the just and due legal compensation" (Hamilton v. Edmondson, 235 Ala. 97, 177 So. 743), which has been called to our attention, would be without application in the instant case, since the contract which the Land Agent of Jefferson County held with the State Land Commissioner fixed his compensation within the statutory limitation. It was not fixed by law, and the Land Agent could not now invoke the above-cited rule for the purpose of claiming that amount over and above $20,000.00 to which the 10% amounted, even if he were a public officer. Moreover, a mere reading of the act itself shows that the Land Agent is not an officer but is a mere contractee with the State of Alabama.

The compensation provided for in the contract which the Land Agent of Jefferson County held with the State Land Commissioner was the compensation which he was to receive during each year which he acted as such Land Agent and was to compensate him for the services which he performed as such

Land Agent. He could not have performed any service subsequent to the date on which his tenure as Land Agent expired, and it is my opinion that his right to any compensation ceased when his tenure of office ceased for the reason that he had already been paid the amount stipulated in the contract which he held with the State Land Commissioner.

The view herein expressed is not in conflict with the holding of the opinions of this office to Hon. W. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of January 28, 1939, (Quarterly Report of Attorney General, Vol. XIV, p. 57) or to Hon. Matt A. Boykin, Judge of Probate, Mobile County, Mobile, Alabama, under date of April 22, 1939, a copy of which is herewith enclosed for your information. In those opinions we dealt with the question of whether or not the Land Agents of Montgomery and Mobile Counties were entitled to 10%, their contracts calling for 10% without any maximum limitation as was the case in Jefferson County, on moneys received after their tenure as Land Agents from redemptions of property that had been purchased by the state at tax sales, which redemptions were secured through their efforts during their tenure as such Land Agents. We held that this percentage was a fee for service rendered and that it had been earned by them during their tenure as Land Agents and should, therefore, be paid to them regardless of the time when it was collected and whether it was collected before or after the contract which they held with the State Land Commissioner had been terminated. It was merely a deferred payment to them of the compensation stipulated in their contract. However, we are of the opinion that this rule would not apply to the Land Agent of Jefferson County for the reason that any percentage that might be paid to him on moneys received since his tenure as Land Agent from redemptions of property that had been purchased by the state at tax sale which were secured through his efforts during his tenure as such Land Agent, would be compensation to him for services rendered during his tenure as such Land Agent for which he has already been paid the amount stipulated in his contract. Certainly he is not entitled to any more compensation than that provided in his contract.

The premises considered, we are constrained to hold that the Land Agent of Jefferson County is not entitled to any percentage on moneys received since his tenure as such Land Agent from redemptions of property that had been purchased by the state at tax sale, even though the redemptions were secured through his efforts during his tenure as such Land Agent.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 22, 1939.

Hon. J. W. Rutland,
Tax Assessor,
Colbert County,
Tuscumbia, Alabama.

Tax Assessor—Tax Assessor of Colbert County, Alabama, not authorized to purchase office supplies for his office. However, when pencils are purchased by Tax Assessor at a time when he is in dire

need of them and when the county purchasing agent was out of the county and said Tax Assessor was unable to requisition said pencils, Court of County Commissioners may reimburse him to the extent of a reasonable sum for said pencils under Section 186 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of March 8, 1939, in which you request my opinion as follows:

"I am sending you herewith my file covering purchase of pencils for my office for which Judge Carmichael refused to issue a purchase order. Judge Carmichael was in Montgomery at the time and I could not await his return.

"Also the pencils he would have furnished me were not suitable for work on a permanent record.

"The Board of Commissioners are willing to pay, if Judge will issue a purchase order.

"Please give me your opinion. Am I, as a county official, not allowed to purchase suitable office supplies?"

In reply to your inquiry, attention is directed to Section 28 of the Revenue Bill of 1935, General Acts 1935, page 274. Said section is as follows:

"Section 28. It shall be the duty of the Courts of County Commissioners or boards of revenue of the several counties in this State to supply the Tax Assessor, Tax Collector and such other tax officials or agents whose duty it is to assess and value property for taxation under this Article, with all necessary books, stationery and printed blanks for the proper conduct of their several offices."

The above-quoted section, supra, is the general law of the State and as such is applicable to Colbert County. It will be noted said section, supra, makes no provision for the purchase of necessary books, stationery or printed blanks by the Tax Assessor should the County governing body fail to make the necessary purchases for the proper conduct of his office. Attention is further directed to Sections 1 and 2 of Act No. 34, House Bill 218, General and Local Acts, Extra Session, 1933, page 17, which was an act to enlarge the duties imposed by law on the governing body of Colbert County, Alabama. Said sections are as follows:

"Section 1. The Board of County Commissioners, or other County governing body, of Colbert County, as such county governing body as now constituted or as may be hereafter constituted, is hereby charged with the duty of purchasing in the name of and for the County of Colbert, all road machinery, tools, implements, books, blanks, office stationery, office or house furniture, fixtures, articles or things which may be required by law for the said County.

"Section 2. The said county governing body, as is now constituted or as may be hereafter constituted, shall make the said above referred to purchase only after competitive bids have been submitted and the said county governing body shall advertise for said bids at least one time in a newspaper published in the County of Colbert, and shall post a notice calling for said bids at least three weeks before the letting of such contracts at the courthouse of said County, in order that due public notice may be given of the intention to make said purchases. Nothing in the second section of this Act shall apply to the purchase of postage stamps."

As will be seen, Section 1 of the local act for Colbert County, Alabama, covers all purchases made as required by law for the County and, therefore, includes all books, blanks, office stationery, office fixtures and furniture and all other articles or things necessary for the proper conduct of the office of Tax Assessor. This section of said act is not in conflict with the provisions of Section 28 of the Revenue Act of 1935, supra, but in fact both have the same provision as regards the purchasing of books, stationery and printed blanks necessary for the proper conduct of the office of Tax Assessor of Colbert County. It is further provided in Section 2 of said local act, supra, the manner in which the county governing body shall make purchases for the county. Provision is therein made for purchases by the county governing body only after competitive bids have been submitted and said section makes no provision for the purchasing of necessary books, blanks, office stationery, office furniture, fixtures, articles or things by a county officer when the county governing body fails to provide the same.

Therefore, after a consideration of Section 28 of the Revenue Act, supra, and Act No. 34, House Bill 218, supra, I am of the opinion that you, as Tax Assessor of Colbert County, Alabama, have no authority to purchase supplies for your office. As heretofore pointed out, under both the general and local laws, it is the duty of the governing body of Colbert County to make purchases of the supplies necessary for the proper conduct of your office and by local law said purchases for the county must be by competitive bid.

However, due to the fact that you, as Tax Assessor of Colbert County, bought in good faith pencils necessary for the proper discharge of your office, at a time when you were in dire need of the same in order to properly discharge your official duties, coupled with the fact that the county purchasing agent was out of the county at the time, and you were unable to make requisition of him for the same, I am of the opinion that the Court of County Commissioners may reimburse you to the extent of a reasonable sum for said pencils under Section 186 of the Code of Alabama, 1923. Said sections is as follows:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, to refund to any person, firm or corporation, money or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvements, tick eradication or any lawful public work, where, after the ad-

vancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims on account of a defect in any law or any other reason."

I refer you to the case of **Escambia County v. Dixie Chemical Products Co.,** 229 Ala. 287, 156 So. 631, which is authority for the position here taken.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 22, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Costs—

When a county works its hard labor convicts on the public roads of the county, the costs that are taxed against such convicts on conviction cannot be paid by the county out of any of the county funds.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of February 1, 1939, is as follows:

"In the event a County works its hard labor convicts on the roads of such County, should the legal costs, that are taxed against the defendant on conviction, be paid by the County to the Clerk for proper distribution?

"Your attention is called to opinions of the Attorney General 1912-1914, page 153."

In my opinion, your inquiry should be answered in the negative.

In such a case as the one detailed in your inquiry, the convict discharges his obligation for costs by performing hard labor for the county on the public roads of the county, yet no money accrues to the Fine and Forfeiture Fund of the county from such labor.

We think the opinion of the Attorney General to Hon. J. R. Livings, Sheriff, Covington County, Andalusia, Alabama, under date of April 28, 1926 (Biennial Report of Attorney General, 1924-1926, p. 336) and the authorities therein cited and quoted from support this view. It is true that a local act of

Covington County was considered in said opinion, but said local act did not change the provisions of the general law insofar as the inquiry now under consideration is concerned. We quote in extenso from said opinion in support of the view hereinabove announced:

"In the instant case the defendant discharges his obligation for costs by performing hard labor for the county on the public roads of the county, yet no money accrues to the fines and forfeitures fund of the county from such labor.

"Does this discharge the obligation of the county, as prescribed by statute, to pay the officers' costs and fees? The writer thinks not. However, there is no obligation upon the county to pay such fees **except** in the manner and to the extent prescribed by statute and **out** of the **fund** set aside for the payment of such fees under **certain** conditions.

Greene Co. v. Hale Co., 61 Ala. 72.

"A prerequisite to charge the fine and forfeiture fund with such fees or costs is that an execution must have been issued and return made **no property found.**

Mims, Treasurer v. State, supra.

"Then, of course, there are other conditions precedent which must exist before such fund can be charged with or costs paid out of the fine and forfeiture fund.

Sections 3763, 3769 and 4039, Code 1923.

"It appears from the last above mentioned statutes that upon certain of the conditions having been performed there remains that there must exist, at the time payment is demanded, or at the time the **claim** properly registered is presented, a surplus, over and above the amount required to pay the registered claims of state's witnesses. The existence of this surplus is the sine qua non of payment.

"There also remains the possibility, in the instant case, that the convict may have worked out the costs in the manner prescribed by statutes, local and general considered in pari materia. If such was the case there would exist no debt due by the convict to the county, hence, no execution could issue.

Hendon v. Delvinis, 137 Ala. 594.

"It therefore follows that the claim for these fees is not valid as against the fine and forfeiture fund of the county since execution has not first been issued against the defendant.

"The fine and forfeiture fund of the county is the only fund out of which such costs or fees may be paid.

"Therefore the county is not liable for such fees except from such fund.

"Summarizing, it is the opinion of the writer that in the instant case, under the circumstances assumed, the court of county commissioners is without authority to order the payment of the fees you mention.

"In conclusion, the writer refers to the provision of law that statutes relating to costs and fees are penal and must be strictly construed, and the officer or person claiming costs or fees must be able to furnish express authority for such claim.

State v. Willis Brewer, 59 Ala. 130.

Torbert v. Hale County, 131 Ala. 145."

The premises considered, I advise you that when a county works its hard labor convicts on its roads the costs that are taxed against the convict or defendant on conviction cannot be paid from any funds of the county.

The opinion of the Attorney General to Hon. Charles L. Townes, Examiner, Centreville, Alabama, under date of June 30, 1913 (Biennial Report of Attorney General, 1912-14, p. 153) referred to in your letter of inquiry is in conflict with the holding of this opinion and is hereby specifically overruled.

In arriving at the foregoing conclusion, we have not considered the provisions of any local acts upon this subject, same not being here presented for review.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 22, 1939.

Hon. G. W. Cuninghame,
Register, Marengo County,
Linden, Alabama.

Municipal tax sales by registers—

1. Municipality has no authority to collect delinquent taxes after certifying them to the register of chancery court under Section 2134 of the 1923 Code.

2. Registers of chancery court not required to accept certified list of delinquent taxes from city clerk after the expiration of three months.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of April 1, 1939, in which you request my opinion as follows:

"Will you please refer to Section 1319 of Political Code of 1907 and advise me with reference to it, after running the Section down? I have only been Register in this County for little more than a year, and am trying to conduct the office according to law, and as I understand the above mentioned Section, all towns or cities in the County should file a certified list with me of unpaid town or city taxes not later than March 31 of each year, and that after that date the town or city would absolutely have nothing more to do with the collecting of delinquent city or town tax, but should be collected by the Register, unless the law has been changed, and I have been unable to find any change in this law. Under this Section I do not believe that the town or city would have any right to collect delinquent taxes after three months from Jan. 1, of each year the delinquent date, and that according to law they are barred so far as the legal part is concerned. I want you to also advise me whether I would be required as Register to accept these certified lists after 3 months from Jan. 1 of each year in case it is not filed with me on March 31 of each year, or within 3 months from Jan. 1 as set out in Section 1319."

If your inquiry is correctly understood, you desire to know, first, whether under Section 1319 of the Code of 1907—now Section 2134 of the 1923 Code—, after the clerk of the municipality has turned over to you a certified list of delinquent taxes, the city can take any action towards the collection of such taxes; and, second, whether you are required to accept such certified list if it is presented to you by the city clerk after the expiration of ninety days.

Section 1319 of the 1907 Code—Section 2134 of the 1923 Code—reads as follows:

"Section 2134. Delinquent taxes; list of.—Within three months after taxes have become delinquent, a list shall be made out and certified to the city or town clerk, describing each piece of property separately, with the name of the owner, if known, and the amount of taxes due on such property, and the amount of taxes due by such owner upon personal property, which also may be collected by a sale of the realty as for taxes due thereon."

From a reading of your inquiry, it appears that you are under the impression that every city and town in your county is required to sell property for delinquent taxes through your office. This is not true, therefore, it becomes necessary to call your attention to two classes of municipalities which use county officials for the purpose of collecting city taxes and selling property in the event of delinquency in the payment of the taxes due thereon.

Act No. 300, page 337 of the General Acts of 1931, provides that municipalities having a population of not less than 6500 nor more than 15,000 shall use the county tax collector in the collection of their city taxes and that in the event of a delinquency in the payment of same that the property upon which they are a lien shall be sold by said county official at same time of sale of property for the collection of delinquent state and county taxes. You are referred to this act and advised that all municipalities in your county having such population are not required to furnish you with a certified list of delinquent taxes as required by Section 2134 of the 1923 Code.

Your attention is further called to Section 201 of Act No. 194, General Acts 1935, page 348, which is a re-enactment of Section 3095 of the 1923 Code. This act provides that any municipality may, by ordinance duly adopted, have

the assessment, equalization, and collection of their taxes done by the county officials named in said chapter and that the sale of property for city taxes shall be handled by the county officials in the same manner as the sale of property for the collection of state and county taxes. You are, therefore, advised that any municipality in your county having duly adopted an ordinance as provided for in said act is not required to furnish you with a certified list of delinquent taxes as required by Section 2134 of the 1923 Code.

In answering your question in reference to Section 2134 of the 1923 Code, it will be necessary to keep in mind that said section does not apply to the two classes of municipalities above referred to, since by law they have a different method for the collection of their delinquent taxes. All other municipalities in your county, not included in the above classification, are subject to the provisions of Section 2134.

Your first inquiry must be answered in the negative. After a city clerk has turned over to the register a certified list of delinquent taxes as provided for in said section, the city no longer has any authority or power to proceed with the collection of any of the taxes contained in said certified list. This must be true for the reason that after the register receives such list, it becomes his duty to docket a case against each taxpayer and proceed under orders of the court to sell such property. Sections 2135-2137, Code of Alabama 1923.

In the case of **Mayor and Town Council of Vinemont vs. Allison,** 191 Ala. 316, 68 So. 142, the city had furnished the register of the chancery court with a list of delinquent taxes and the register had docketed a case against each taxpayer, who thereupon filed a plea setting up a defense. When the cases came up for hearing before the court, they were continued at the request of the parties. After the cases had been continued in chancery court, the city undertook to collect the taxes by the use of an execution, as provided for in Section 1313 of the 1907 Code (Section 2128 of the 1923 Code). The taxpayers then appealed to the circuit court for a restraining order against the city, which was granted. The case was appealed by the city to the Supreme Court, which affirmed the order of the lower court granting a restraining order. Mr. Justice McClellan, speaking for the Supreme Court, held:

> "Under Code 1907, Section 1313, providing relative to municipal taxes that after the assessment has been corrected, it has the force and effect of a judgment and after delinquency may be enforced by execution, section 1319, providing that within three months after taxes shall become delinquent a list shall be made out of the property the taxes against which are delinquent, section 1320 providing that such lists shall be filed with the register in chancery, who shall issue a summons as in chancery cases, and section 1322, providing that if no pleading setting up a defense shall be filed, a final decree shall be made adjudging such property liable for such taxes and directing a sale thereof, and that if any defense is made the court shall proceed to give relief under its own rules of procedure, where a municipality instituted such a proceeding in the chancery court, and the taxpayers filed defenses, whereupon the cause was regularly continued, the chancellor **properly** granted an **order restraining** the **officers** of the **municipality** from enforcing the collection of such taxes under section 1313, as it was undertaking to do, in order that its jurisdiction, which had already attached, might be protected in the process of adjudging the rights of the **parties."**

Your second inquiry must likewise be answered in the negative:

"'In the sale of land for taxes, great strictness is required. To divest an individual of his property without his consent, every substantial requirement of the law must be complied with.' Dane v. Glennon, 72 Ala. 160, 163; Oliver v. Robinson, supra; Reddick v. Long, supra; Clarke v. Rowan, 53 Ala. 400; Pollack v. Milam, supra; Childress v. Calloway, 76 Ala. 128, 134." Drennen et al. v. White, 191 Ala. 274, 68 So. 41.

It must be observed that in making tax sales that the statute must be closely followed and every requirement met.

In the case of **Drennen et al. vs. White,** 191 Ala. 274, 68 So. 41, the Supreme Court passed upon a case involving Sections 708, 709, and 710 of the City Code of Birmingham. The report shows that Section 708 required the City Treasurer to sell property on which there was a delinquent assessment; that Section 709 required him to make a demand in person on the owner of the property, and unless the delinquent assessment was paid by such owner within ten days that he should call upon the city clerk for an execution and proceed to sell said property; and Section 710 made it the duty of the city clerk to issue the execution when called upon by the city treasurer. In its decision, the Supreme Court held the sale void because the city clerk issued the execution before the city treasurer had made the ten-day personal demand upon the property owner. The Supreme Court not only held the sale void, but said the clerk improperly issued the execution. Mr. Justice McClellan, speaking for the Court, had the following to say:

"Sections 709 and 710, quoted before, required a personal demand, by the treasurer or his deputy, upon the delinquent if he could be found; or, if he was not a nonresident and could not be found, then a written demand was required to be left at his residence or place of business; and the demand upon the delinquent must have been made ten days before the treasurer was authorized to call upon the city clerk for an execution to sell the property. Our opinion is that the making of the demand prescribed was a condition precedent to the right of the treasurer to call upon the city clerk for the execution and a condition precedent for the issuance thereof by the clerk. The object the described demand was intended to conserve was to afford the delinquent a reasonable opportunity, under the influence of the impelling presence of the impending issue of an execution and a sale of the property thereof, to voluntarily discharge the lien on his property. A valuable, conservative, and highly desirable prescription in favor of the lienee was thus raised up. This right, positively provided, could not be ignored, though it might be waived by the owner of the property who was entitled to the demand. If the prescribed demand was not made by the treasurer, and it was not waived by the property owner on whom the demand should have been made, the execution was improperly issued, and the attempted sale under it was void."

In the case of **Helm vs. Griffith,** 19 Ala. App. 1, 95 So. 548, the Court of Appeals passed upon the validity of a tax sale of municipal property made by a register and gave the following rule of construction in reference to Sections 1319, 1320, and 1322 of the 1907 Code (now Sections 2134, 2135 and 2137 of the 1923 Code):

"By statute, the chancery court is given jurisdiction to sell property on which the taxes have become delinquent, and in this respect section 1319 of the Code provides as follows:

"'**Within three months after taxes shall have become delinquent, a list shall be made out and certified by the city or town clerk,** describing each piece of property separately, with the name of the owner, if known, and **the amount of taxes due on such property,** and the amount of taxes due by such owner upon personal property, which also may be collected by a sale of the realty as for taxes thereon.'

"The following section (1320) provides for the filing of these lists with the register in chancery, the issuance of a summons, or for publication in cases of owner unknown, and section 1322 authorizes a decree, without further proof, if no pleading setting up a defense is filed, adjudging the property liable for taxes and directing a sale of the same for their payment, and the costs and penalties and interest that has accrued.

"From this resume of the statutes, it is obvious that in order for jurisdiction of the chancery court to attach, it is necessary that it should appear: (1) That an assessment against the property was made; (2) that the taxes assessed were 'delinquent' as that term is defined by statute at the time the jurisdiction of the court is invoked; (3) that a list (a) certified by the city clerk, (b) containing a description of the property, (c) and the amount of taxes due thereon, was filed (d) within three months after the taxes became delinquent (e) with the register in chancery. Until this is done, by the plain letter of the statute, the chancery court has no jurisdiction, because, says the law, in that kind of a case, and only in that kind of a case, is the chancery court vested with authority to sell property for delinquent municipal taxes."

From the rules of law given in the cases of **Drennen vs. White** and **Helm vs. Griffith,** supra, it seems clear that unless the plain letter of the statute is followed that not only is a sale void but the court has no jurisdiction whatsoever. It is essential that the city clerk make out a certified list and file the same with the register within three months after the taxes become delinquent for the court to acquire jurisdiction. Without jurisdiction any sale made under an order of the court would be void. Therefore, it would appear useless and futile for the register to accept a certified list from the city clerk after the expiration of ninety days, since any action resulting therefrom and based thereon would be void.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 22, 1939.

Hon. W. H. Quillen, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Where forfeiture is had against a defendant in a criminal case this is a civil action separate and apart from the original criminal case and therefore is subject to trial tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 22, 1939, in which you request my opinion as follows:

"I have just read the opinion of the Attorney General of Alabama dated June 7, 1937, and shown on page 186 of Vol. VII of Quarterly Report of Attorney General for the period from April 1, 1937 through June 30, 1937, relative to trial tax in forfeiture cases.

"John Doe was indicted by the grand jury in Franklin County on a charge of public drunkenness and the defendant was arrested on the warrant of arrest in said case and defendant was released from the custody on an appearance bond of $200.00. The said public drunkenness case was called for trial in the Law & Equity Court and the defendant failed to appear and the Court ascertained that the defendant has gone to Texas and a conditional forfeiture was entered against the bondsmen. A case was docketed against the bondsmen and notices of forfeiture issued against the bondsmen and served on them. At the next session of the court the public drunkenness case was called for trial and the defendant again failed to appear as he was still in Texas and the Court on motion of the Solicitor ordered the public drunkenness case withdrawn and filed. The Court made the forfeiture final and absolute against the sureties on the bail bond. In the John Doe public drunkenness case **no trial tax was imposed** because the defendant never appeared for trial at any time and the case was withdrawn and filed. Should a trial tax be charged in the forfeiture case against the bondsmen, as no trial tax was imposed in the original case, which was withdrawn and filed?

"Section 9 of the Revenue Act of 1935 quoted from in the Attorney General's Opinion, in part, as follows:

"' *** nor shall said trial tax be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings **in which said trial tax fee has been** imposed, and cases for municipal assessments shall not be subject to such tax, etc.'

"The original case against John Doe was withdrawn and filed **and** therefore no trial tax was imposed in the original case. Therefore, I think that the trial tax should be charged and collected in the forfeiture case against the bondsmen. What do you think about it? I will appreciate an opinion."

In the case of Copeland vs. Jefferson County 192 Ala. p. 12, our Supreme Court held that where a forfeiture is taken against a defendant and bail **in a** criminal case such action is a civil proceeding and becomes a separate and individual case from the original criminal case, and that the forfeiture **case** against the defendant and bail must be docketed as a separate and independent procedure. This being true we hold that a forfeiture case would carry trial tax under Section 9 of the Revenue Laws of 1935, which is in part as follows:

"Section 9. A trial tax of three dollars ($3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is **now** pending and which hereafter goes upon the docket of any circuit court

in this State, to be taxed and collected as other costs, and when collected to be paid by the clerk or register of such court as follows *** "

We call attention to the fact that a forfeiture against the defendant and bail in a criminal case is a summary proceeding taken against the defendant and his bondsmen for a breach of contract with the State which contract or bond assures the presence of the defendant in court to answer the charge against him, and, therefore, is not a proceeding in aid of the pending suit but an independent action, a conditional judgment which may be made final on proper hearing after due notice. I call attention to opinions of this office written, one June 7, 1937 to the Clerk of the Circuit Court of Marengo County, Report of Attorney General Vol. VII p. 186 (Biennial Report of Attorney General 1936-1938, p. 252), and also one written to the Clerk of the Circuit Court of Sumter County June 14, 1938, Quarterly Report of Attorney General, Vol. IX p. 99.

The foregoing opinions being in conflict with the views above expressed, are hereby overruled and hold for naught.

I am of the opinion that you were in error in not charging a trial tax in the criminal case as it appears the case had already gone on the docket of the court. The trial tax becomes due on the docketing of the case.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 22, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

1. The salary of all circuit judges whose circuit is composed of only one county, having one judge, is now fixed at Six Thousand Two Hundred Dollars ($6,200) per annum.

2. Sections 5525 and 5526 of the Code of 1923, as amended, not applicable to Montgomery County after 1930 Federal Census.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 9, 1939, in which you request by opinion as follows:

"Please refer to Sections 5510, 5525 and 5526 (as amended Acts of 1927, page 479), Code of Alabama, 1923, Act No. 354 (General Acts of 1923, page 369), Act No. 138 (General Acts 1933, page 124) and Act No. 149 General Acts 1936-37, page 166) and advise me as follows:

"1. When the salary paid by the State to each Circuit Solicitor, with certain exceptions, was reduced from $3,600.00, as provided by Section 5510, Code of 1923, to $3,000.00 by Act No. 138 (General Acts 1933, page 124), did such reduction increase the balance to be paid certain Solicitors by the County, such Solicitors being paid under that part of Section 5510 which reads as follows:

> " 'In Circuits that are composed of only one County, in which there are two and not more than five Judges, the salary of said Circuit Solicitor shall be fifty-seven hundred dollars per annum, thirty-six hundred dollars of which shall be paid out of the State Treasury, as other Circuit Solicitors are paid, and the remainder shall be paid out of the County Treasury of such County, in equal monthly installments, on the warrant of such Solicitor.'

"In other words, should the salary paid such solicitors by the County since the effective date of the 1933 Act, be $2,100.00 or $2,700.00 per annum?

"2. When the salary paid by the State to Circuit Judges was increased from $4,000.00 to $5,000.00 per annum (Act No. 149, General Acts 1936-37, page 166) did such increase reduce the amount to be paid Circuit Judges by the County under Act No. 354 (General Acts 1923, page 369) which reads as follows:

> " 'That from and after the passage of this Act, the salary of the Judges of all Judicial Circuits in the State of Alabama, which are composed of one County and have only one Judge, shall be Five Thousand Two Hundred ($5,200.00) Dollars per annum, Four Thousand ($4,000.00) Dollars of which amount shall be paid out of the State Treasury, as the Judges' salaries of all other Circuits are paid, and One Thousand Two Hundred ($1,200.00) Dollars of which shall be paid out of the County Treasury of the County composing the Circuits, the same to be paid monthly on the warrant of the Judge of such Court, which shall be approved by the Judge of Probate of the County composing the Circuit.'

"In other words should the salary paid such Judges by the County since the effective date of the 1936-37 Act be $1,200.00 or $200.00 per annum?

"3. Does Section 5526 Code of 1923, as amended by Act of 1927, (General Acts 1927, page 479) refer and apply only to Assistant Circuit Solicitors, as provided for in Section 5525, Code of 1923?

"4. If your answer to Question No. 3 is in the affirmative, would the salary of Assistant Circuit Solicitor of Montgomery County be governed by Section 5526 after date the 1930 census was released, such census listing Montgomery County in excess of 98,000 inhabitants, and if not governed by such Section what would the salary of the Assistant Circuit Solicitor of Montgomery County be after the release of the 1930 census?

"5. If your answer to Question No. 3 is in the negative, to what Assistant Circuit Solicitors does Section 5526, as amended, refer and apply?"

In answering your first inquiry as to the salary of circuit solicitors, I am enclosing an opinion of this office rendered to Hon. W. T. Seibels, Solicitor 15th Judicial Circuit, on May 10, 1939, which I think answers your question fully.

Answering your second inquiry, I call your attention to an Act of the Legislature approved September 24, 1923, General Acts 1923, page 369, which is as follows:

"That from and after the passage of this Act, the salary of the judges of all judicial circuits in the State of Alabama, which are composed of one county and have only one judge, shall be Five Thousand Two Hundred ($5,200.00) Dollars per annum, Four Thousand ($4,000.00) Dollars of which amount shall be paid out of the State Treasury, as the judges' salaries of all other Circuits are paid, and One Thousand Two Hundred ($1,200.00) Dollars of which shall be paid out of the county treasury of the county composing the circuits, the same to be paid monthly on the warrant of the judge of such court, which shall be approved by the Judge of Probate of the county composing the circuit."

You will note that the above-quoted act fixes the salary of all judges of circuit courts composed of one county and having only one judge at Five Thousand Two Hundred ($5,200.00) Dollars per annum and provides further that Four Thousand ($4,000.00) Dollars of this amount shall be paid out of the State Treasury as the Judges' salaries of all other circuits are paid, and One Thousand Two Hundred ($1,200.00) Dollars shall be paid out of the County Treasury of the county composing the circuit. The provisions of the above act are very plain and therefore need no comment. However, we call your attention to an Act of the Legislature approved February 27, 1937, General Acts 1936-37, page 166. This act is as follows:

"Section 1. That the annual salaries of those certain officers of the State of Alabama hereinafter named shall be the amounts hereinafter set opposite the respective offices, and shall be payable in monthly installments, viz: The salaries of the Justices of the Supreme Court shall be as follows: Chief Justice $6,000.00. Six Associate Justices, (each) $6,000.00. The salaries of the Judges of the Court of Appeals shall be as follows: Three Judges (each) $5,500.00. The salary of every Circuit Judge in the State of Alabama shall be $5,000.00.

"Section 2. The salaries herein provided for the Circuit Judges is the amount of the portion to be paid by the State and nothing herein shall be construed to affect any provision of the law for the payment by any county of any additional amount of salary to any such officer or officers.

"Section 3. This Act shall repeal all laws heretofore fixing the salaries payable out of the Treasury of the State of Alabama to the officers herein specified.

"Section 4. This Act shall become effective immediately upon its passage and approval by the Governor."

Section 1 of this act fixes the salaries of the various Circuit Judges of Alabama at $5,000.00 per annum. If this act stopped here there could be no question but that this salary would be fixed definitely at $5,000.00. We call attention to Section 2 of this act which we here repeat:

"Section 2. The salaries herein provided for the Circuit Judges is the amount of the portion to be paid by the State and nothing herein shall be construed to affect any provision of the law for the payment by any county of any additional amount of salary to any such officer or officers."

It is my opinion that the above act, when construed in its entirety, means that the salary of the Circuit Judges is raised from $4,000.00 as fixed by the Act of 1923, supra, to $5,000.00 per annum by the Act of 1937, supra. The amount fixed here of $5,000.00 is the amount the **State will pay.** We find that Section 2, supra, provides that the salary therein provided for the Circuit Judges shall not be construed to affect any provision of law for the payment by the county of any additional amount of salary to any such officer. This takes us back to the Act of 1923, supra, and we find there that the amount paid by the county on such salary is $1,200.00. This applies only to Circuits composed of one county, and having only one judge. It is therefore my opinion that this provision still remains and was not repealed by the Act of 1937, supra, as it does not conflict in any particular with the Act of 1936-37, supra. Therefore, it is my opinion that the salary of any judge whose circuit is composed of only one county and having only one judge is now paid $6,200.00 per annum under the act of 1937, supra, and the Act of 1923, supra.

My answer to your third inquiry is in the affirmative. Section 5525, Code of Alabama 1923, provides for the appointment of an assistant circuit solicitor in all counties of the State where the circuit is composed of one county which has a population of sixty-five thousand inhabitants and not more than ninety-five thousand inhabitants according to the last Federal Census or any subsequent census. Section 5526 fixes the salaries of such solicitors at $2,400.00 per annum. Of course, this section has to be construed in pari materia with Section 5525, supra, which says that the circuit must be composed of one county only, the population of which county must not exceed ninety-five thousand inhabitants. We find that while Montgomery County alone composes one circuit, yet the 1930 census raised Montgomery County out of the bracket fixed by Section 5525 as the population of this county is shown to be 98,761. Therefore, the Act of 1927, General Acts, 1927, page 479, which amended Section 5526, Code of Alabama 1923, does not now apply to Montgomery County. The above being true, neither does Section 5525, supra, apply to Montgomery County. Therefore, Montgomery County could come under Section 5522, Code of Alabama 1928 (Michie) and the salary of the deputy solicitor would be paid as is provided by Section 5523, Code of Alabama 1928 (Michie). This answers your fourth inquiry. The office of Assistant Circuit Solicitor of Montgomery County is now governed by Act No. 83, H. 209, approved March 1, 1939.

In answer to your fifth inquiry, Section 5526, Code of Alabama 1923, refers and applies to all assistant circuit solicitors who come under the provisions of Section 5525 as to counties and population.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 23, 1939.

Hon. W. G. Culp,
Sheriff, Chilton County,
Clanton, Alabama.

1. The fees payable to sheriff under Section 4654, Code of Alabama, 1923, are payable only on conviction.

2. Section 3741, Code of Alabama, 1923, has reference to fees legally provided for sheriffs and clerks under their schedule and has no reference to seizure fees and mileage in prohibition cases.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 17, 1939, in which you request my opinion as follows:

"I would like to ask your opinion about a question that has been uncertain in my mind concerning sheriff's mileage and seizure fees in Prohibition cases.

"To give you a concrete case, a few nights age, we caught a man operating an automobile with fifty gallons of whiskey on the highway in this county and he is charged with transporting more than five gallons and in the event of this man's acquittal, will you please advise me how or from what fund I may lawfully collect the seizure fees as provided by Section 4654 of the Code of 1923 and also the mileage fees as provided by Section 3740 of the Code, and in the event of this man's conviction, will you please advise me how and in what manner and from what fund I shall be able to collect said fees?

"Also will you please advise me if and from what fund I am entitled to said fees, that is, mileage and seizure fees in Prohibition cases in the event a person is acquitted or convicted for a misdemeanor for possessing prohibited liquors?"

In my opinion, the seizure fees provided for by Section 4654 are contingent upon the conviction of the defendant. The pertinent part of this section is as follows:

"When an officer arrests any person in possession of an unlawful quantity or quantities of prohibited liquors, or of such liquors under conditions prohibited by law, **then on the conviction** of such party of a violation of a city ordinance or state law, whether in the recorder's court, or a state court, possessing jurisdiction, a fee for making the seizure of the liquors shall be taxed against the defendant, and paid to such officer as a part of the cost of the case as follows: *** "

Biennial Report of Attorney General, 1934-1936, page 212.

In your letter, you refer to Section 3740 of the Code of Alabama, 1923, as if it authorizes sheriffs to collect mileage in certain prohibition cases. This section does not so provide. I assume that you have reference to Section 3741, the pertinent part of which is as follows:

" *** When a sheriff captures or arrests a defendant with contraband or prohibited liquors or beverages, either with or without warrant, there shall be taxed in his favor against the defendant **on conviction**, in addition to any other fees and charges now allowed by law, ten cents per mile each way from the courthouse to the place of arrest *** ."

In my opinion, a sheriff is not entitled to collect such mileage fees unless the defendant is convicted.

I am of the opinion that when a defendant is convicted of a misdemeanor and you have performed services as contemplated in Sections 3741 and 4654 that you are entitled to receive the compensation provided therein just the same as if the defendant had been convicted of the felony.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 23, 1939.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama,

Counties—Highways—

A county is not liable for torts committed by its officers, agents, or employees in the absence of a statute imposing a liability.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion, under date of March 21, 1939, which is as follows:

"On the following agreed statement of facts between the claimant and the Dale County Board of Commissioners I request your opinion as to the libaility of the County for damages:

"One of the county road crews was in the act of repairing a bridge, and after the bridge had been repaired, one of the county graders was used in pushing dirt up to the end of said bridge. The claimant in this

case has parked his car close to the end of the bridge, and at the request of the foreman, delivered by another party, moved his car approximately 115 feet away from where the work was going on. The car was parked in spot designated by party delivering message. The car was parked almost entirely off of the highway, leaving only the front wheels on shoulder of road, which left approximately 18 feet of road clearance.

"There was sign up stating bridge closed some one-half mile from scene of work at forks of road.

"The car had been parked unattended some two hours and it is an acknowledged fact that the road grader was turned around successfully one time in the immediate vicinity of the car without accident, and that the operator of the road machine in turning a second time in or about the same vicinity, backed into the car causing damages that amounted to $28.98.

"We would appreciate your rendering us ruling on whether or not the County is liable for the damages incurred, and if so, from what fund they may be legally paid."

If the facts stated in your inquiry are construed in favor of the claimant and against the county, it resolves itself into a question of whether a county is liable for the tortious acts of its officers, agents, and employees, while acting within the line and scope of their employment.

The general rule of law is that a county is not liable for the negligent actions of its officers and agents except in those jurisdictions where a statute imposed such a liability. **Hamilton vs. Jefferson County,** 209 Ala. 517, 96 So. 628; **Phillips vs. Tuscaloosa County,** 212 Ala. 357, 102 So. 720.

In Alabama there is no statute imposing such a liability upon a county, therefore, the general rule of law herein stated must prevail. In accordance with these authorities and the rules of law therein stated, I am of the opinion that the claim which you mention in your inquiry is not a legal claim against your county and that the county is not liable for the payment of the same. Biennial Report of Attorney General, 1936-38, p. 427; Biennial Report of Attorney General, 1928-30, page 265.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 23, 1939.

Mrs. Daisy Donovan,
Child Labor Inspector,
Division of Labor,
Department of Industrial Relations,
Montgomery, Alabama.

Child Labor—

Appearance on stage of girl, under sixteen, with older sister who receives compensation therefor, held violative of Section 3500(15) of the Code of 1923, even though younger girl receives no pay.

Opinion by Assistant Attorney General Loeb.

Dear Madam:

I have your letter of April 19, 1939, in which you request my opinion as follows:

"In connection with a problem that has recently arisen in the enforcement of the Child Labor Law of this State, your opinion is respectfully requested.

"We desire to have your opinion of Section 3500, paragraph 15 . . .

" 'Nor shall any child under the age of sixteen years be employed upon the stage of any theatre or concert hall, or in connection with any theatrical performance or other exhibition or show, except that children fourteen years of age may be employed as ushers in theatres or concert halls in accordance with the provisions of section 3495, 3502 and 3503 of this chapter,' in reference to the following case which has come to our attention.

"A girl, fifteen years of age, who has completed the eighth grade, is appearing on the stage with her older sister in a song and dance act. The manager of this company has requested us to interpret the law in connection with this act if his show is sponsored by a school or some other organization and the younger girl is not paid for her act. As we see it she is being exploited for commercial gain since she is acting with her sister who is being paid for her work.

"The managers of this show were seen and the case discussed with them. These girls have been appearing over the radio in Birmingham and a temporary certificate was given the younger girl to broadcast over WBRC but not to appear on the stage until we could secure an opinion from you. For this reason we are asking that you render this opinion as promptly as possible.

"I should like to discuss this particular case with the Assistant Attorney General to whom you assign this opinion."

In my opinion, the appearance on the stage of any theater, or concert hall, or in connection with any theater performance or other exhibition or show, of a girl fifteen years of age with her older sister who receives compensation for such appearance, would constitute a violation of Section 3500(15), even though the younger girl received no compensation for such appearance. It is true that in an opinion rendered under date of February 7, 1939, to you we held that the term "employed" as used in Section 3500(15) implied a contract of employment for compensation and work for hire pursuant to such contract, whether said contract be oral, written or implied, but the conclusions reached in that opinion cannot be employed to permit an evasion of the obvious intent of the Legislature in enacting the so-called Child Labor Law. The law abhors dodgers and will not tolerate subterfuges. **Johnson v. State,** 16 Ala. App. 425, 78 So. 419; **In re Opinions of the Justices,** 225 Ala. 502, 144 So. 111. In this instance it appears that the services of the younger girl in the "song and dance act" is relied on by both parties, the employer and the girl's sister, to complete the act. It is natural to presume that the compensation received by the older girl is measured in part by the value of the services of her sister to the act. In the case of **Commonwealth v. Griffith,** 90 N. E. 394, the Supreme Court of Massachusetts has held in a like situation that:

> "If one is procured to work regularly under an engagement, rendering valuable service for a specified time, it may be found that he is employed, although he receives nothing as an agreed compensation. He is used and relied upon to accomplish the purpose of his employer."

Such we believe to be the law applicable to the instant case and you are, therefore, advised that, under the facts detailed in your inquiry, there would be a violation of Section 3500(15).

The mere fact that the proposed performance would be sponsored by a school or some other organization would not change the conclusion hereinabove reached inasmuch as the prohibition in Subsection 15 of Section 3500 is against the child appearing upon the stage of any theater or concert hall etc., without regard to the character of the sponsor of such performance.

I have not considered Section 3495 of the Code inasmuch as consideration of same was not requested.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 23, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

1. When the court upon the motion of the solicitor orders an indictment withdrawn and filed, the case may be docketed either by the name of the defendant or by the grand jury number. When so ordered by the judge, it is the clerk's duty to follow these instructions.

2. Generally, there is no authority of law for making final record in case when indictment is withdrawn and filed, and clerk is not entitled to compensation therefor, but when acting on order of the court, he is entitled to such compensation.

3. The clerk is not entitled to a fee for entering judgment in a case until final disposition of the case.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 1, 1939, in which you request my opinion as follows:

"Please refer to the following:

"'Circuit Court ..... County
State of Alabama
vs.
..... Offense—Murder

Indictment 4/17/31—Capias Issued 4/17/31
No record of return

**Duplicate** Capias issued bearing same date—Returned "Not Found" 6/26/34

Orders of Court

"'6/27/34 It appearing to the Court that Capias or Warrant of Arrest had issued for two terms, and has been returned "Not found" upon motion of the State Solicitor in open Court on this day; It is ordered and adjudged by the Court that the indictment in this case be docketed and be and the same is hereby ordered withdrawn and filed, with leave to reinstate the same when the ends of justice require such reinstatement, and Sheriff and Clerk are hereby allowed costs for issuance and service of subpoenas and final record and other costs.'

"and advise me as follows:

"1. Would the Clerk be authorized, under such order, to place such a case on the docket, both as to case number and name of Defendant, thereby disclosing the name of a Defendant that has never been arrested for such offense?

"2. Would the Clerk be authorized, under such order, to make final record in such case, thereby making possible another source that would disclose the name of a Defendant that has never been arrested for such offense?

"3. If your answer to question No. 2 is in the negative, would the Clerk be entitled to fee for making final record, same to be paid from the Fine and Forfeiture Fund?

"Would the Clerk be entitled to fee for entering judgment in such a case, same to be paid from the Fine and Forfeiture Fund?

"5. If your answer to Questions No. 1 and No. 2 is in the negative, what is the duty of an Examiner of Accounts, examining such Court, when such a condition prevails?"

My answer to your first inquiry is in the affirmative. The Clerk is bound to obey the orders of the court unless such orders are void on their face. The judge is absolutely in charge of his court and the clerk is only a ministerial officer of the same. **Shelley v. Thomas,** 232 Ala. 227, 167 So. 316; Opinion of Attorney General to Chief Examiner of Accounts under date of May 15, 1939. However, I think the best policy would be to docket the case only by the grand jury number. In this way no intimation would be given as to the identity of the defendant.

In answer to your second and third inquiries, it is my opinion that generally there is no authority of law for making final record in case where the indictment is withdrawn and filed, and the clerk is not entitled to any compensation therefor. **Quarterly Report of Attorney General,** Vol. II, page 245. However, as stated above, when ordered to do so by the Court, the clerk must follow the mandate of the Court. When he makes a final record upon order of the Court, he would be entitled to the proper fees therefor.

In reply to your fourth inquiry, my answer is in the negative as there could not be a judgment in the case until it was finally disposed of.

The above obviates a necessity to answer your fifth inquiry.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 23, 1939.

Hon. O. C. Weaver,
Superintendent of Education,
Escambia County,
Brewton, Alabama.

Schools—

County boards of education may pay an obligation due the State to the credit of the State Insurance Fund on insurance premiums although the obligation was due in 1932-33.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 17, 1939, in which you request my opinion as follows:

"Please advise me if a County Board of Education, under the Budget Act, can pay an obligation incurred six years ago."

With further regard to the above inquiry, it appears from your letters of April 18, 1939, and May 15, 1939, that the obligation in question is an obligation due the State for an insurance premium due the State Insurance Fund which was incurred in 1932-33.

From the above statement of facts I am of the opinion that the county board of education may legally pay this obligation.

Section 11 of Act No. 300, S. B. 351, approved September 2, 1935, which act established a budget system for county and city school systems, provides as follows:

"Section 11. WARRANTS MAY BE ISSUED TO PAY DEBTS CREATED PRIOR TO JULY 1, 1935.—In order to pay debts not otherwise funded which were incurred for legitimate obligations prior to the first day of July, 1935, any county board of education or any city board of education may borrow money and as security therefor, or in payment of such loans, shall issue callable warrants or execute promissory notes bearing interest at a rate of not to exceed six per cent per annum, payable at such time as may be agreed upon; or may sell such warrants or notes at par and use the proceeds in the settlement of such debts. All warrants or notes so issued shall be payable out of such school funds of the county or city as may be available for such purposes. Payments of principal and interest on such warrants or certificates of indebtedness shall be arranged so as to require approximately equal payments each year over a period of not to exceed fifteen (15) years. When these outstanding debts have been funded in accordance with the provisions of this section, no other warrants may be issued or debts incurred, except in accordane with the provisions of this Act."

Since this obligation was incurred prior to July 1, 1935, same can be refunded in accordance with the provisions of Section 11, supra. In preparing the budget for each fiscal year the amount of refunding warrants which are payable in that particular fiscal year should be taken into consideration along with other expenses of said fiscal year.

**Yours very truly,**

THOMAS S. LAWSON,

Attorney General.

May 23, 1939.

Hon. R. J. Westbrook,
Circuit Clerk,
Marengo County,
Linden, Alabama.

Act No. 33, General Session 1939—Witness Fees—

1. County Treasurer can transfer witness fees after three years to fine and forfeiture fund.

2. Clerk not affected by passage of this Act.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of April 5, 1939, in which you request my opinion as follows:

"Please render me an official opinion on the following:

"Is money which is now being held in a Special Witness Fund account under Section 7244 of the 1923 Code of Alabama, transferable to the Fine and Forfeiture Fund at this time under Section 7244 of the Code as amended by an Act known as the Calhoun Act, (Bill No. 33, S. 59, Calhoun) approved February 16, 1939, more fully described as an Act to amend Section 7245 of the 1923 Code with reference to presentation of witness claims within three years and transfer of unclaimed witness fees to Fine and Forfeiture Fund.

"There is $325.25 in a Special Witness Fund account in the Planters Bank and Trust Company, Depository for Marengo County, this money being placed in this account by instructions of State Auditors under Section 7244 of Code of Alabama, 1923, upon the completion of the examination of Hon. W. F. Gilder, Circuit Clerk of Marengo County, and Hon. B. F. Gilder, Register of Marengo County, is this money transferable at this time to the Fine and Forfeiture Fund of Marengo County, under Sec. 7244, as amended by the Calhoun Act as described above."

Before answering your inquiry specifically, permit me to briefly trace the itinerary of money collected for witness fees on its way to the general fund of the county, under Sections 7244 and 7245 of the Code of Alabama of 1923. The clerk collects these fees and pays them out to the proper claimants. On January first of each year the clerk turns over to the county treasurer all monies so collected which have been unclaimed for two years. In other words, the money is collected by the clerk and kept by him for two years. The county treasurer then deposits this money in a special witness fund. There it is kept to pay claimants who claim their fees within six years under Section 7245, Code of 1923, before amendment. After the expiration of six years, the remaining funds in the special witness fund are transferred to the General Fund.

The passage and approval of Senate Bill No. 59—Calhoun (Act No. 33, General Session 1939) changed this procedure in two ways. First, it provides that the **county treasurer** may transfer the funds out of the special witness fund after the expiration of **three** years from the time of its collection by the clerk and becoming subject to disbursement. Second, it provides that the **County treasurer** transfers this money to the **fine and forfeiture fund** rather than to the general fund as before. These and only these are the changes brought about through the passage of Act No. 33 (General Session 1939).

In your request you refer to "money which is now being held in special witness fund account under Section 7244." I presume, therefore, that you, as clerk, have set up this fund to keep witness fees collected by you for the two years required under Section 7244. You further state, "is this money transferable at this time to the fine and forfeiture fund of Marengo County under Section 7244 as amended by the Calhoun Act described above?" Your question then appears to be: Can you, as clerk, transfer money which you have been holding under Section 7244 to the fine and forfeiture fund under the authority of the Calhoun Act?

Our answer is in the negative. Act No. 33 (the so-called Calhoun Act) has in my opinion no application to Section 7244 of the Code. The Act is entitled "to amend Section 7245." Furthermore, throughout the Act the **county treasurere or custodian of county funds** is referred to with reference to its application. Section 7244, which deals with the **clerk's** retention of witness fees for two years, has not, in my opinion, been amended. Therefore, you are not affected by the passage of this legislation. Your procedure in regard to the handling of witness fees is still to be governed by Section 7244 as appearing in the Code of 1923. We are of the opinion that the county treasurer and not the clerk and Section 7245 and not Section 7244 are affected by the passage of Act No. 33 (General Session 1939).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 26, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Holder of motor vehicle accessory license under Schedule 16 of Section 348 of Revenue Acts of 1935, entitled to sell batteries, but not entitled to recharge them, without first obtaining battery shop license under Schedule 20 of Section 348 of Revenue Acts of 1935.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 17, 1939, in which you request my opinion as follows:

"An individual in the City of Wetumpka is a dealer in Auto Accessories and has procured from the Probate Office the Accessory License under Schedule No. 16 of the 1935 License Schedule. This dealer also keeps Batteries for sale and recharges batteries.

"Please advise us whether this dealer in addition to license under Schedule No. 16 should also secure license under Schedule No. 20 for Battery Shop."

I am of the opinion that your inquiry should be answered in the affirmative.

Schedule 16 of Section 348 of the Revenue Acts of 1935 provides as follows:

"Schedule 16. Each person selling motor vehicle accessories, including automobile radios, and/or motor vehicle parts, and/or tires, shall pay the following annual license: In cities of over one hundred thousand (100,000) inhabitants, forty dollars ($40.00); in cities of over twenty-five thousand (25,000) inhabitants and not over one hundred thousand (100,000) inhabitants, thirty dollars ($30.00); in cities and towns of over five thousand (5,000) inhabitants and not over twenty-five thousand (25,000) inhabitants, twenty dollars ($20.00); in cities and towns of over two thousand (2,000) inhabitants and not over five thousand (5,000) inhabitants, ten dollars ($10.00); in all other places whether incorporated or not five dollars ($5.00). Provided regularly licensed filling stations or garages are not required to pay the above accessories license if their stock of accessories at any time does not exceed the wholesale value of Seventy-five dollars ($75.00)."

Shedule 20 of Section 348 of the Revenue Acts of 1935 provides as follows:

"Schedule 20. Each battery shop for the repairing, recharging or selling batteries in cities and towns of over sixty thousand inhabitants, twenty dollars ($20.00); in cities and towns of fifteen thousand inhabitants and not over sixty thousand inhabitants, fifteen dollars ($15.00); in cities and towns of five thousand and not over fifteen thousand inhabitants, ten dollars ($10.00); in all other places whether incorporated or not, five dollars ($5.00)."

If the party in question merely sold batteries and did not recharge them. he would not be liable for a license under Schedule 20, supra. The sale of batteries, in my opinion, comes within the contemplation of accessories under Schedule 16, supra. Cf. Quarterly Report of Attorney General, Vol. III, page 184. However, the holder of a license under Schedule 16 does not have the right to recharge batteries without first obtaining a license under Schedule 20. In my opinion, the right to sell batteries does not carry with it the right to recharge them. Cf. Quarterly Report of Attorney General, Vol. V, page 21.

Section 357 of the Revenue Acts of 1935 provides as follows:

"Section 357. Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be

collected without credit or offset, except where specific provision is made therefor."

The above section is applicable to the instant situation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 26, 1939.

Hon. S. G. Johnson,
Judge of Probate,
Lamar County,
Vernon, Alabama.

Filing Tax—

The recording of an assignment of a mortgage by a National Bank, upon which no mortgage tax has been paid, is subject to a deed filing tax as provided by Schedule 46 of Section 348, General Acts of Alabama, 1935, p. 456.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for official opinion dated May 1, 1939, which follows:

"The First National Bank, Wetumpka, Alabama, has transferred and assigned several mortgages to the Birmingham Trust & Savings Company, copy of one of which is hereto attached.

"Please advise me if this assignment is taxable if and when recorded."

It is my conclusion that the assignment of the mortgage from the First National Bank of Wetumpka to the Birmingham Trust & Savings Company is subject to a deed filing tax as provided by Schedule 46 of Section 348, General Acts of Alabama, 1935, page 456.

This office has held that the recording of an assignment of a mortgage, upon which a mortgage tax has not been paid, is subject to a deed tax. **Biennial Reports of Attorney General 1936-1938, page 729. Biennial Reports of Attorney General, 1930-32, page 803.** Since the mortgage in question was held by a National Bank, a mortgage tax has not been paid upon same as filing taxes are not applicable to mortgages of National Banks. **Biennial Report of Attorney General, 1932-34, page 202.** There is no provision exempting the Birmingham Trust and Savings Company, a State bank, from paying a filing tax. Therefore, it is my opinion that a deed filing tax must be collected on the above referred to instrument when it is offered for record.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 26, 1939.

Hon. Roy Sanderson,
Judge of Probate,
Marion County,
Hamilton, Alabama.

Non-Profit Corporation—Charter Fees—

The charter fee of a non-profit corporation is based on Sections 7154 and 7155 of the Code of 1923.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your request for official opinion of March, 1939, which is as follows:

"I am enclosing a copy of the articles of incorporation for 'The State Producer and Processing Association, Inc.' filed in the office for record. As you will observe this is incorporated in the sum of $22,000.00. Will you please read the paper in question carefully and advise me if this paper will carry the corporation tax of $1.00 for each $1,000.00. I am of the opinion that I should collect $22.00 for the State and $2.50 for the Secretary of State."

From a reading of the articles of incorporation accompanying your request, we find that the State Producer and Processing Association, Inc. is incorporated under the provisions of Article 20 of the Code of Alabama of 1923 as a non-profit cooperative corporation.

The fees charged for examining and filing corporation papers for a non-profit corporation are based on Sections 7154 and 7155 of the Code of 1923, which state as follows:

"7154. Fees to probate Judges and secretary of state.—For examining and filing corporation papers under provisions of this article the probate judge in whose office the same is filed shall receive a fee of two dollars and be paid fifteen cents per hundred words for recording the same; the secretary of state for the use of the state shall be paid five dollars for filing certificate of incorporation forwarded by probate judge as provided by law."

"7155. Fees for filing articles of incorporation.—For filing articles of incorporation, an association organized hereunder shall pay ten dollars; and for filing an amendment to the articles, two and one-half dollars."

It will be seen from the above that the fees you should charge are as follows:

| | |
|---|---|
| For filing articles of incorporation | $10.00 |
| Probate Judge: | |
| For examining corporation papers | 2.00 |

Recording—15c per hundred words
Secretary of State ..... 5.00

It is my opinion that the corporation in question should pay the fees set out above.

As per your request, we are returning herewith the articles of incorporation.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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May 27, 1939.

Hon. J. Collier Merrill,
Tax Collector,
Covington County,
Andalusia, Alabama.

Taxation—Municipal Taxes—

Assessment and Collection of by County Tax Assessor and Collector, including sale of property for nonpayment of said taxes and the redemption of property so sold, pursuant to the provisions of Section 201 of the 1935 Revenue Act, as amended by Act No. 57 (General Acts, 1939), approved February 27, 1939, discussed generally.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 8, 1939, in which you request my opinion as follows:

"May I direct your attention to Section 201, Article VI, of an Act entitled, 'An Act to provide for the general revenue of the State of Alabama,' approved July 10, 1935 (General Acts of 1935, p. 348), as amended (H. B. No. 183—Smyer) by ingrafting thereon Act No. 300, General Acts of 1931, p. 337, for the purpose of propounding and asking you to answer questions as follows:

"1. What is the maximum compensation that the tax assessor and collector are respectively entitled to receive for assessing and collecting municipal taxes of the municipality which invokes the aid of Section 201 as amended?

"2. Is the official bond of the Tax Assessor and of the Tax Collector responsible for his failure respectively to assess and to collect lawfully the taxes of a municipality which invokes the aid of Section 201, as amended, with respect to said taxes?

"3. Pursuant to said section 201, as amended, will the same and identical assessment of state and county taxes, for the tax year immediately preceding, or ending on September 30 prior to, the beginning of the tax year for municipal taxes, lawfully made of real and personal property subject to municipal taxes, on forms prepared by the Department of Revenue (General Acts of 1935, p. 274, section 27), suffice, without notice to the taxpayer other than that provided by the laws of Alabama as to assessments for state and county taxes, as a valid assessment of said property for municipal taxes?

"4. When the Tax Assessor prepares an abstract of state and county taxes, should he embrace in said abstract the valuation and amount of municipal taxes, or should he make a separate and distinct abstract of municipal taxes, for each municipality in the country that invokes the aid of section 201 as amended?

"5. Should the Tax Collector, whose aid has been invoked by ordinance pursuant to said section 201, as amended, embrace on the same receipt for State and County taxes, the amount of municipal taxes?

"6. Is such Tax Collector authorized to accept payment of State and County taxes without requiring payment by the taxpayer of all municipal taxes he is charged with the duty of collecting?

"7. Must said Tax Collector, in asking for a decree by the Probate Court for a sale of property upon which taxes are delinquent, report all property upon which municipal taxes are delinquent in the same report, and as a part thereof that he makes for state and county delinquencies?

"8. Should said report show separately thereon the amount of municipal taxes, interest and charges?

"9. Should the notice of decree issued by the Probate Court embrace the amount of municipal taxes, interest and charges, or should a separate and distinct decree notice of such municipal taxes be issued?

"10. Should the decree of sale made by the Probate Court for the sale of property for payment delinquent state and county taxes also include the amount of municipal taxes, interest and charges? Should said amount of municipal taxes, interest and charges be shown separately thereon from state and county taxes, and costs, or should there be a merger?

"11. Should the description in such joint decree of sale, (if you should so rule), of property subject to state and county taxes be separately listed to the end that there may be a distinct description of the property subject to state and county taxes from that subject to municipal taxes?

"12. With reference to publication of sale of property for payment of state and county taxes, may I lawfully include in said publication a description of the property for payment of municipal taxes, and the amount of such municipal taxes, interest and costs? Should the description of the property ordered to be sold for payment of municipal taxes be so separated in the advertisement, to the end that the property subject to

such municipal taxes may be identified? Should the amount of such municipal taxes, interests and costs be separately stated, or should said amounts be merged with the amount of state and county taxes and costs?

"13. When the Tax Collector offers the property for sale, pursuant to said advertisement, is he lawfully authorized to offer such property at one and the same auction for payment of state, county and municipal taxes? Is he required to state separately the amount thereof?

"14. Is the Probate Judge, under the provisions of section 201, as amended, authorized and empowered to purchase in the name of the state the property so auctioned by the Tax Collector, in absence of other bidders, and bid therefor the amount of state, county and municipal taxes, interest and costs?

"15. Should the Probate Judge show separately on his redemption records the amount municipal taxes, interest and costs for which the property was sold, or should such sums be merged with the state and county taxes, charges and costs?

"16. May the Probate Court, under said section 201, as amended, permit the redemption of property sold for payment of state and county taxes without at the time requiring redemption of said property from the sale for payment of municipal taxes for which the property was sold?

"17. May the State of Alabama, pursuant to said section 201, as amended, sell the property which it purchased without including in said sale price the amount lawfully due the municipality for taxes, interest and charges?

"18. Do any of your answers to interrogatories 7 to 17, inclusive, have application to uncollected municipal taxes that were due prior to the date the municipality invokes the aid of section 201, supra, before amendment?

"19. Do any of your answers to question 6 to 17, inclusive, have application to uncollected municipal taxes that became due after the municipality invoked the aid of section 201, before amendment? If so, state which.

"20. Please give me any other information that will be helpful to any of the county officials in effecting a lawful assessment, collection, and redemption of municipal taxes of a municipality that is entitled to the benefits of said section 201, supra, as amended.

"I attach hereto for your convenience a copy of section 201 as amended."

Section 201 of the 1935 Revenue Act, to which reference is made in the first paragraph of your letter above quoted, appeared as Section 3095 of the Code of Alabama, 1923, and now appears in an amended form as Act No. 57 (General Acts, 1939) approved February 27, 1939, the pertinent section thereof being as follows:

"Section 1. That said Section 201, Article VI, of an Act of the Legislature of Alabama entitled, 'An Act to provide for the General Revenue of the State of Alabama,' approved July 10, 1935, be and the same is hereby amended so as to read as follows:

"Section 201. Any municipal corporation in this State may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided in this Chapter, and all the machinery herein provided for the assessment, equalization and collection of State and County taxes, the enforcement of such collection, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes and the redemption from such sales, and the assessor and collector shall receive such compensation as may be fixed by the governing body of such municipality, not to exceed one-half of one per cent for collection, **and if any municipal corporation has heretofore availed itself of the provisions of this section or shall hereafter do so by the adoption of an ordinance as provided for herein, there shall also be applicable to the assessment and collection of its taxes, the sale of property for the collection thereof, and the redemption from such sales, all such other machinery, procedure and provisions of law as are now applicable with respect to the assessment, levy and collection of municipal taxes of cities having a population of not less than 6,500 nor more than 15,000, according to the last or any subsequent Federal Census. And such machinery, procedure, and provisions shall apply to all uncollected taxes whether heretofore or hereafter assessed, provided the municipal corporation has heretofore adopted such ordinance."** (Emphasis ours)

The Supreme Court of Alabama in the case of **United States Fidelity & Guaranty Co. v. State for the use of the City of Gadsden,** 231 Ala. 375, 165 So. 71, construed Section 3095, supra, with reference to the liability of the Tax Collector's official bond for failure of this officer faithfully to perform the duties imposed upon him by a municipality which had invoked the aid of that section as authorized by law.

The court held that the official bond of the Tax Collector was liable for failure of the Tax Collector faithfully to perform his duties with respect to the collection of municipal taxes pursuant to the mandates of Section 3095, supra (Section 201 of the 1935 Revenue Act).

Several questions being presented to the Supreme Court through a petition for declaratory judgment filed by the City of Opp against H. J. Brogden et al., reported in 236 Ala. 180, 181 So. 752, seeking judicial determination on the procedure to be employed in the assessment and collection of municipal taxes, including the sale of property for the non-payment of such taxes and redemption from such sale, which the City of Opp, by ordinance pursuant to the provisions of Section 3095, supra (Section 201 of the 1935 Revenue Act) had shifted to the tax officials of Covington County. Mr. Justice Gardner speaking for the court observed as follows:

"(3) The sale of lands for State and County taxes (General Acts 1935, page 351 et seq.) has been separate and apart from those for city taxes. Section 2124 et seq., Code of 1923. The statute clearly contemplates the use of the State machinery for such purposes in the matter of municipal tax sales and redemption, but contains no evidence of any inten-

tion to change the existing laws as to the matter of separation as well as that of superiority of State and county over the municipal tax liens.

"The above noted statute is, therefore, to be interpreted as having reference to the adoption of State machinery without the disturbance of the existing rule as to separateness and superiority as just outlined. It was not the legislative intent to add any burden to the State and county as to the enforcement of these tax laws or grant to the municipality any advantage other than that of economy and convenience in the use of State machinery in the matter of this tax enforcement. **It is to be noted that when a different procedure was desired, the legislature so prescribed as evidenced by the Act of June 26, 1931. General Acts 1931, page 337.** (Emphasis ours)

Since rendition of the above-mentioned opinion, the Legislature by Act No. 57, supra, amended Section 201, supra, by adding the words which are underscored as herein shown. The Legislature, no doubt, took due cognizance of the observation made by Justice Gardner and expressed itself by directing the county tax officials to avail themselves of the procedural authorizations and directions theretofore limited to municipalities within a certain population range to which Mr. Justice Gardner referred in the above-quoted excerpt from his opinion, when they had been required by proper ordinance to assess and collect municipal taxes. The definite words used by the Legislature in the amendatory act indicate an unmistakable legislative intention that the tax officials should use the same machinery and procedure for the assessment and collection of municipal taxes for those municipalities which elect to avail themselves of the services of the county tax officials, as provided in said act, that are used for the assessment and collection of state and county taxes, but not separately as heretofore, subject, however, to qualifications and limitations hereinafter mentioned. Further support of this conclusion is to be found in the following language from the opinion in the case of **City of Opp v. Brogden,** supra:

"We are left to determine the legislative intention as best we may from the language of the statute, and its evident purpose considered in connection with existent laws relating to the subject matter."

Your inquiry necessitates a determination of legislative intent to be reached from the language used and its evident purpose considered in connection with the existing laws on the subject matter at the time of the passage of the amendatory act, and we have so considered these laws in reaching the conclusions hereniafter expressed.

It is my opinion, therefore, that the Legislature not only intended to continue the use of the machinery and procedure theretofore authoritatively employed for the assessment and collection of municipal taxes and not in conflict with the amendatory act but also that it intended to change the existing laws as to the matter of separation in the manner authorized by Act No. 300 (General Acts 1931, p. 337) approved June 26, 1931, which is the act referred to in the amendatory act and in the opinion of the court in the case of City of Opp v. Brogden, supra. However, the intention of the Legislature was to confine such change to the assessment and collection machinery and procedure, including sale and redemption, without ingrafting other provisions of the act not pertinent to such assessment and collection.

Considering ad seriatim the specific questions embraced in your inquiry, I respectfully advise you as follows:

1. The maximum compensation to which the Tax Assessor and the Tax Collector are respectively entitled is "not to exceed one-half of one per cent for assessing and one-half of one per cent for collection." This provision was contained in Section 201, supra, prior to the amendment and still appears in said section, as amended. No change in this provision was made by the amendment.

2. The official bonds of the Tax Assessor and of the Tax Collector are responsible for the due and lawful performance of the duties imposed upon them, respectively, by Section 201, supra, as amended, when the aid of said section is properly invoked. **United States Fidelity & Guaranty Co. v. State for use of the City of Gadsden,** supra.

3. It is my opinion that the state and county assessment made by the Tax Assessor of property subject to municipal taxes suffices as a lawful assessment of municipal taxes pursuant to Section 201, supra, as amended, without further notice other than that mentioned in your inquiry. Your attention is directed to Sections 1 and 6, respectively, of Act No. 300, supra, which read as follows:

> "Section 1. The tax year for all cities in Alabama which now have a population of not less than 6500 nor more than 15,000 inhabitants according to the latest Federal census, or which may hereafter have such population according to any Federal census hereafter taken, shall commence on the first day of October of each year and end on the thirtieth day of the next succeeding September, and on and after the first day of October, 1932, the municipal taxes shall be due such cities for the tax year in advance on the first day of October of each tax year, and shall be delinquent at the time when the State and County taxes for the next preceding tax year are delinquent."

> "Section 6. It shall be the duty of the tax assessor of each and every county in which such cities are situated on and after the 1st day of October, 1931 to show on the assessment list made or taken by him under the provisions of law as now applicable to State and County taxes what property, if any, described in the lists, is situated within such cities, and the assessor shall ascertain the value of each item, or subject of taxation, situated in such cities separately from the value of each item not within such cities in such a way as to make of easy ascertainment the assessed value of property within such cities."

Your attention is further directed to an opinion of this office addressed to Mrs. C. F. Hart, Tax Collector, Covington County, Andalusia, Alabama, under date of December 14, 1936, (Quarterly Report of Attorney General, Vol. V, p. 119) in which we spoke as follows:

> "Answering question three it would seem that the notice issued for state and county taxes would be sufficient to the taxpayer for city taxes as the valuation is identical."

Question three in Mrs. Hart's request is identical with the question you present. It was reasoned in the opinion to Mrs. Hart that inasmuch as the

law required the municipal assessment to be based on the state valuations, no further notice was necessary. We adhere to that conclusion.

4. In answering question four, we refer you to Section 8 of Act No. 300, supra, which reads:

> "Section 8. After the 1st day of October, 1931, the book required to be made by the County tax assessor under the provisions of law shall also show the property subject to municipal taxes in such cities, and shall be so ruled that the amount of such city taxes charged to each taxpayer or against property in favor of such cities for the next succeeding municipal tax year on the assessed value of the then current State tax year, can be entered and extended and footed up, and the footings carried from page to page, and the total amounts thereof, and footed up so as to show the amount of taxes to be paid by such cities."

It is my opinion that the abstract book used for state and county purposes should embrace the valuations and amounts of municipal taxes, separately itemized for identification purposes, on the same abstract, and that no separate and distinct abstract for municipal taxes is authorized or required.

5. It is my opinion that this question should be answered in the affirmative. I refer you to Section 11 of Act No. 300, which reads as follows:

> "Section 11. Upon collection of taxes by the tax collector, he shall embrace in his receipt, required to be given as provided by law in regard to State and County taxes, a statement of the amount of city taxes, if any, paid on real estate, and city taxes, if any, paid on personal property, and if any interest has accrued stating the amoust thereof paid, such receipt shall also show the tax year for which the City Tax is paid and City for which the tax is paid, and such receipt shall be prima facie evidence that such taxpayer has paid his City taxes for the year stated on the real and personal property and other subjects of taxation."

6. I am of the opinion that the Tax Collector is not authorized to accept payment of state and county taxes without requiring payment by the taxpayer of the municipal taxes which are assessed on his property subject to the limitations hereinafter mentioned. This conclusion is reached in view of the positive directions contained in Section 34 of Act No. 300, supra, which reads as follows:

> "Section 34. All laws now in force or hereafter enacted in regard to the collection of State and County taxes and procedure, with reference thereto, and the enforcement of collection shall apply to and be in force as to such city taxes, except as such laws are changed by or in conflict with the provisions of this act and the county tax collector shall collect or enforce the collection of such city taxes at the same time, in the same manner and way, and as a part of one and the same collection as the collection of State and County taxes and all procedure incident to or in any wise connected with the collection of State and County taxes shall be equally applicable to the collection of said city taxes and all such city taxes shall be collected in the same way and in the same proceedings as State and County taxes."

To hold otherwise would necessitate a separation of state and county taxes from municipal taxes which, in my judgment, was not the intention of the Legislature. The reasons supporting said conclusion have already been stated.

This does not mean, however, that where more than one piece of real property which is separately listed and valued is included in the assessment that the taxpayer cannot pay all the taxes due on any one piece of said real property, after paying all taxes on personal property, (Section 169-A of the 1935 Revenue Act), or that a purchaser, lien holder or mortgagee of real estate or personal property included in an assessment with other real estate or personal property of the person to whom said property was assessed cannot discharge the tax lien against said property in which he has such interest by paying all taxes due on the property in which he has such interest (Section 169 of the 1935 Revenue Act).

7. Your seventh question is answered in the affirmative. The Tax Collector, in asking for a decree by the Probate Court, must report the property upon which the taxes are delinquent, and he is not authorized to change the description of the property assessed but must make his report conform thereto. His report following the assessment would show the property situated in the municipality, as well as the rural property as hereinabove pointed out.

8. Question eight must be answered in the affirmative. The amount of municipal taxes and the interest and charges thereon must be separately shown on such report in order for the Probate Judge to render his decree of sale in the manner in which he is required to render the same pursuant to the provisions of Section 22 of Act No. 300, supra, which is quoted hereinbelow in answer to your tenth question.

9. The amount of municipal taxes together with interest and charges thereon should be separately shown in the notice of decree issued by the Judge of Probate, but no separate notice is required. This for the same reasons given in answer to your eighth question.

10. The decree of sale made by the Probate Court for the sale of property for payment of delinquent state and county taxes should also include, separately itemized and listed, the amount of municipal taxes, together with interest and charges thereon. Such is required by the provisions of Section 22 of Act No. 300, supra, which reads:

> "Section 22. The decree for tax sales rendered by the Probate Judge under the provisions of law in regard to State and County taxes shall embrace taxes due to such cities, showing the aggregate amount due to the State, County and City showing what amount is for the City and the tax year of the City for which the same is due it."

11. The same description would be required in the decree of sale that is contained in the assessment. The employment of such description would necessarily identify the property subject to municipal taxes, in view of the provisions of Section 6 of Act No. 300, supra, which requires the Tax Assessor to list and describe separately the municipal property.

12. The publication of sale would necessarily contain a separate description of the property situated in the municipality if the Tax Assessor has

complied with the requirements of Section 6 of Act No. 300, supra, requiring such property to be listed and described separately. The publication would also conform to the decree of sale which separately states the amount of municipal taxes, together with interest and charges thereon. A compliance by the Tax Assessor and Tax Collector with the provisions of Act No. 300, supra, will require the Tax Collector to separately describe the municipal property from the rural property, to state separately the municipal taxes, together with interest and charges thereon, but all in the same publication, and not in separate publications. Only one publication is authorized or required, although separate descriptions of the property and separate statements of the taxes, together with interest and charges thereon, necessarily follow from a compliance with the provisions of said Act No. 300, supra.

13. When the Tax Collector offers the property for sale, he is compelled to follow the decree of sale in the publication notice, otherwise the sale would be void. In view of the holdings hereinabove made that the Legislature did not intend a distinct and separate use of the tax procedure and machinery, but on the other hand intended a joint use of such procedure and machinery for the collection of state, county and municipal taxes, it is my opinion that the Tax Collector should offer all of the property for sale at one and the same auction for the payment of state, county and municipal taxes. Separate auctions would defeat the very purpose and intention of the Legislature. This is conclusively shown by the provisions of Section 23 of Act No. 300, supra, which reads:

> "Section 23. The county tax collector shall embrace in his certificate to a purchaser under the provisions of law in regard to State and County taxes the amount of taxes due on the property described in the certificate to such City in the same manner and way as he is required to set forth in said certificate the amount due to the State and County."

Said section requires that there be embraced in the certificate to the purchaser at the tax sale under the provisions of law in regard to state and county taxes the amount of taxes due on the property described in the certificate to the city in the same manner and way as is required to set forth in his cetrificate the amount due to the state and county. This precludes an auction for municipal taxes separate and apart from the auction for state and county taxes.

14. This question must be answered in the affirmative. While Act No. 300, supra, contains no express or specific authorization for the Probate Judge, as the agent of the state, to purchase property for payment of municipal taxes, that such was the legislative intent is shown by Sections 29 and 30 of said Act No. 300, supra, which read respectively:

> "Section 29. That the State auditor shall enter in the books caused to be prepared by him under the provisions and requirements of law in regard to State and County taxes, the amount of city taxes due on the property described in the books in the same manner and way as he is required to enter the amount of State and County taxes due thereon, and in making sales of said property the amount at which the property is sold shall not be less than the whole amount of taxes, including such city taxes, interest, costs and officer's fees as provided for and required to be paid in the case of redemption of such land."

"Section 30. When the lands bid in by the State have been sold by the State, the State auditor shall draw his warrant on the State treasurer in favor of the city for the amount, if any, that the said city is entitled to and forward the same to such city."

15. The Probate Judge is required to show separately on his redemption records the amount of municipal taxes, together with interest and charges thereon, for which the property was sold, to the end that such sums may not be merged with the amount of state and county taxes, together with interest and charges thereon. If this were not done, the Judge of Probate would not be able to comply with the provisions of Section 28 of said Act No. 300, supra, which reads as follows:

"Section 28. The Judge of Probate at the time he is required to remit to the State Treasurer and to the County Treasurer redemption money under the provisions of law in regard to State and County taxes, should also pay to the City Treasurer, or person designated by the council, board of Commissioners or other governing body of the city as treasurer, the proportion of redemption money, if any, belonging to the city, and all of such provisions of law in regard to State and County taxes shall be applicable to such cities and city taxes in the same manner and way as to the State and County taxes."

16. In my opinion, the Probate Judge is not authorized to permit the redemption of property sold for state and county taxes, which has also been sold for municipal taxes, without at the same time requiring redemption from the sale for municipal taxes, subject to the limitation hereinafter mentioned in my answer to question seventeen. The requirements of Section 28 of said Act No. 300, supra, that the Probate Judge remit the city taxes at the time he remits state and county taxes indicates a clear legislative intent that he require redemption from sale for municipal taxes at the same time that redemption is made from sale for state and county taxes. See also Sections 29 and 34 of Act No. 300, supra.

17. Question seventeen must be answered in the negative, subject to the limitation hereinafter mentioned. Section 29, supra, specifically provides that the state may not sell the property for "less than the whole amount of taxes, including such city taxes, interest, costs and officer's fees as provided for and required to be paid in the case of redemption of such land."

My answers to questions sixteen and seventeen in no way affect the rights of parties having a right to redeem property sold for taxes to redeem a part of the property so sold by paying all charges thereon, without redeeming all of the property included in the tax sale. Cf. Section 268 of the 1935 Revenue Act.

18. It is my opinion that the answers hereinabove given to your inquiries number seven to seventeen, both inclusive, do not have application to uncollected municipal taxes that were due prior to the date the municipality invoked the aid of Section 201, supra, before amendment. These taxes were not assessed by the County Tax Assessor and the machinery and procedure of the state could not be easily adapted to such collection. In my judgment, it was not the legislative intent to charge the county tax officials with the responsibility of the collection of taxes that had not been shifted to them prior to the amendment of said Section 201, supra.

19. It is my opinion that the answers hereinabove given to your inquiries number six to seventeen, both inclusive, do apply to uncollected municipal taxes that became due after the municipality invoked the aid of Section 201, supra, even though the invocation was before said section was amended. The Legislature made definite provision that said Section 201, as amended, should apply "to all uncollected taxes, whether heretofore or hereafter assessed, provided the municipal corporation had heretofore adopted such ordinance." The collection machinery made available by the amendment should now be employed to collect such municipal taxes.

Distinct and separate reports by the Tax Collector, distinct and separate decrees of sale, distinct and separate publication notices and redemption independence, as was necessary prior to the amendment (City of Opp v. Brogden, supra) have been discarded by the amendment and such distinction and separation is no longer necessary.

By the amendment of said Section 201, supra, it is my judgment that the Legislature has created for municipal taxes collectional parity with state and county taxes, although the superiority of the lien for state and county taxes is specifically preserved (Section 5 of Act No. 300, supra).

We believe that this gives you full and complete information on this subject and feel that further comment is unnecessary.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 30, 1939.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Use Tax—

1. Proceeds of said tax less the cost of collections shall be paid into the Special Educational Trust Fund to be expended only for salaries of teachers in the elementary and high schools of the state.

2. Proceeds of said tax cannot be used for any other purpose for which the moneys in the Special Educational Trust Fund are ordinarily used.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 16, 1939, in which you request my opinion as follows:

"We quote below paragraph of House Bill 83, Section 22, Sheet 11, with reference to 'Use Tax', as follows:

" 'The amount remaining after payment of all expenses incurred by the department in the collection of such funds or the administration of this act, shall be paid into the Special Educational Trust Fund to be expended only for salaries of teachers in the elementary and high schools of the State.'

"From the above paragraph we would understand the 'Use Tax' is to be paid by the Comptroller into the 'Special Educational Trust Fund' and earmarked to be expended only for salaries of teachers in the elementary and high schools of the State.

"We are advised by Senator Hayse Tucker that it was not the intent that this 'Use Tax' was to be expended only for this purpose, but that this fund was to go into the 'Special Educational Trust Fund' and used for the same purpose as other special taxes which go into the 'Special Educational Trust Fund.'

"We would like to have your opinion as to whether this 'Use Tax' can be put into the 'Alabama Special Educational Trust Fund' along with the other special taxes and used for general purposes, or if it must be kept separate and used for salaries of teachers in elementary and high schools of the State."

It is my opinion that the proceeds of the Use Tax less the cost of collection must be paid into the Special Educational Trust Fund to be expended only for salaries of teachers in the elementary and high schools of the state, and such proceeds may not be used for the general purposes for which the moneys in the Special Educational Trust Fund are used.

You have quoted in your letter the pertinent part of the Use Tax Act, which is the last sentence of Section 22 thereof. The language of this sentence, which is the only part of said act that is pertinent to your inquiry, is plain, clear and unambiguous. In fact, it is difficult to imagine any language which the Legislature could have used that could have more clearly expressed its intent on this subject.

It is true that one of the fundamental rules of statutory construction is to ascertain and give effect, if possible, to the intention of the Legislature, and that the intention of the Legislature, when ascertained, is the law itself. However, there are certain other rules of statutory construction that must be considered in determining the legislative intent.

One of these is the rule that where the language of a statute is clear and the intent is obvious, there is no room for construction, and in such a case the language should be given the meaning therein plainly expressed, the court having discretion in construing statutes only where the meaning is doubtful. **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 51 So. 159; **L. & N. R. R. Co. v. Western Union Telegraph Co.,** 195 Ala. 124, 71 So. 118; **Kreutner v. State,** 202 Ala. 287, 80 So. 125; **Tucker v. McLendon,** 210 Ala. 562, 98 So. 797; **State v. Practorians,** 226 Ala. 259, 146 So. 411; **Abramson v. Hard,** 229 Ala. 2, 155 So. 590; **State v. Tuscaloosa Building & Loan Association,** 230 Ala. 476, 161 So. 530; **Bozeman v. State,** 7 Ala. App. 151, 61 So. 604; certiorari denied Ex parte Bozeman, 183 Ala. 91, 63 So. 201; Daley v. State, 13 Ala. 310, 69 So. 338; **State v. H. G. Fain Service Station,** 23 Ala. App. 239, 134 So. 119, certiorari denied 220 Ala. 55, 124 So. 121.

It is a further well known rule of statutory construction that, even though the intention of the Legislature may be actually known to the courts, or may be shown to the courts, it cannot be carried into effect if the language used is not capable of carrying it into effect. Our Supreme Court has ably stated this rule in the following language from the opinion by Mr. Justice McClellan in the case of **Maxwell v. State,** 89 Ala. 150, 7 So. 825:

> "While there are circumstances under which the meaning of words will be enlarged or restrained, or even entirely disregarded, when the intent of the legislature, as gathered from the whole act and other acts in pari materia, renders it necessary; it would require a stronger case than is involved here, before we could feel authorized, *** to say that they mean nothing by the very plain language they employ; and this though we might be morally certain, aside from the words, that the particular result was never in fact present in their minds. Of such case we adopt the language of Lord Campbell: 'I can not doubt,' said his Lordship, 'what the intention of the legislature was; but that intention has not been carried into effect by the language used. It is far better than we should abide by the words of a statute, than seek to reform it according to the supposed intention.'—**Coe v. Lawrence, 1 E. & B. 516.**"

Mr. Justice Haralson has ably spoken for the Supreme Court on this subject in the following language taken from his opinion in the case of **The State ex rel Robertson v. McGough,** 118 Ala. 159, 24 So. 395:

> "But, there are other rules of interpretation that may override all others, as 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature *** should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.'—Cooley on Const. Lim., 69, 70. *** 'We can only learn what they intended, from what they have said. It is theirs to command, ours to obey. When their language is plain, no discretion is left to us. We have no right to stray into the mazes of conjecture, or to search for imaginary purposes.'—**Lehman v. Robinson,** 59 Ala. 241."

These were early expressions from our Supreme Court from which it has not departed.

Applying these rules of statutory construction to the instant case, as must be done, we advise you that the proceeds of the Use Tax less the cost of collection must be paid into the Special Educational Trust Fund to be expended only for salaries of teachers in the elementary and high schools of the state, and that such proceeds cannot be used for the general purposes for which moneys in the Special Educational Trust Fund are used. This for the reason that the Legislature has so directed in plain, clear and unambiguous language, and it is not within our province "to stray into the mazes of conjecture" to ascertain their intention, even though we may be "morally certain, aside from the words that the particular result was never in fact present in their minds," as has been suggested by one of the Legislature's most able members.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 30, 1939.

Hon. Wm. J. Kern, Clerk,
Inferior Criminal Court,
Mobile County,
Mobile, Alabama.

Witness Fees—Inferior Criminal Court of Mobile County—

Witness for the State attending in more criminal cases than one on the same day in said court only entitled to fees in one case to be selected while so attending (Act No. 34, H. B. 96, approved February 17, 1939).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 13, 1939, in which you request my opinion as follows:

"Please enlighten me as to the following:

"Section 10 of the Act creating the Inferior Criminal Court of Mobile County provides that witnesses must demand of Clerk in advance of trial his attendance fee that said fee be taxed and collected for his benefit.

"It has been the custom of this Court in taxing for the benefit of the arresting officer an attendance fee of fifty (.50) cents in each of any number of cases that may be disposed of in a single day.

"Shall we continue doing so in face of an act approved February 17, 1939, which in effect says that a witness for the State in attending more criminal cases than one on the same day, shall be entitled to fees in one case, to be selected by him."

Section 10 of the Act creating the Inferior Criminal Court of Mobile County, (Act No. 588, approved February 23, 1899) Local Acts of Alabama of 1898-99, page 1164, provides that witnesses before the judge of the Inferior Criminal Court should be entitled to the same witness fees as provided in cases before a justice of the peace. Section 10 is as follows:

"Sec. 10. Be it further enacted, That witnesses in cases before said judge of the said Inferior Criminal Court shall be entitled to the same fees, to be collected in the same manner, as is provided in like cases before justices of the peace, and at the end of the trial or examination they shall receive certificates, and if the said fees are not called for within six months, they shall be forfeited and paid into the county treasury."

The fees of witnesses in criminal cases before a justice of the peace are regulated by Section 3771, which provides as follows:

"In all criminal cases before justices of the peace, unless otherwise provided, witnesses are entitled to fifty cents per day, while in attendance on the trial, to be taxed in the bill of costs."

Section 3770 of the Code, which section has been amended by Act No. 34, H. 96, approved February 17, 1939, provides, as amended:

"FEES OF STATE WITNESSES WHEN SUBPOENAED IN MORE CASES THAN ONE:—A witness for the state attending in more criminal cases than one on the same day, shall only be entitled to fees in one case, to be selected by him while so attending."

It is obvious that Section 3770, as amended, applies to State witnesses in justice of the peace courts as well as to those in circuit courts. Section 3770 was originally enacted in 1883 (Act No. 77, General Acts of Alabama 1882-83, page 150). The title of Act No. 77 was "To regulate the fees of witnesses for the State in criminal cases." No attempt was made in this original enactment to distinguish fees of State witnesses in criminal cases in the circuit courts from those in justice of the peace courts or any other courts, nor did the codifying authorities see fit to make such distinction in the original codification of this act in the Code of 1886 as Section 4890. This section has been brought forward without change to the Code of 1923 as Section 3770.

It appearing, therefore, that witnesses before the judge of the Inferior Criminal Court of Mobile County are authorized, by the local act hereinabove referred to, to receive the same fees as is provided in like cases before the justices of the peace; and it further appearing that witnesses before justices of the peace are governed by those limitations noted in Section 3770, as amended, it necessarily follows that witnesses in criminal cases in the Inferior Criminal Court of Mobile County may receive only such fees as are allowed by Section 3770 of the Code of 1923, as amended by H. B. 96, Act No. 34, approved February 17, 1939.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 30, 1939.

Hon. H. R. Summer,
Tax Collector,
Morgan County,
Decatur, Alabama.

Taxation—Tax collector can begin enforcement of decree of court for sale of lands for taxes by commencing advertising the next day after the day on which the term of said court ends.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 8, 1939, in which you request my opinion as follows:

"The Probate Court of Morgan County, Alabama, renders a decree for sale of lands for taxes, at the May Term, Monday, May 8, 1939. What is the earliest date the Tax Collector can advertise the lands for sale? There seems to be a difference of opinion of Tax Collectors."

In answer to your inquiry it is my opinion that the earliest date you can advertise the lands for sale is the next day after the day on which the May term ends.

Section 224 of the Revenue Acts of 1935 provides in pertinent part as follows:

"Section 224. Immediately at the end of any term of court at which any decree for sales of real estate for the payment of taxes are rendered, or as soon thereafter as practicable, the tax collector shall proceed to enforce such decree by sales of real estate ordered to be sold, and to this end shall give notice for thirty days before the day of sale, by publication for three successive weeks in some newspaper published in the county, *** "

It will be noted that the tax collector shall proceed to enforce such decree by sales of real estate ordered to be sold immediately at the end of the term of court at which the decree was rendered, or as soon thereafter as practicable. The enforcement of the decree is started by proper advertising. He can proceed with the advertising immediately at the end of the term of court at which the decree was rendered. The law does not recognize a fraction of a day. **Beck v. Johnson,** 235 Ala. 323, 179 So. 225. Therefore, it will be necessary to wait until the next day after the term ends before the advertising can begin. In other words, if the term ends on a certain day, the advertising can be commenced on the following day. The terms of the Probate Court are governed by Section 9590, Code of 1923, as amended by General Acts 1932, page 52.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 31, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Person who buys lumber from sawmills and resells same to the retail trade is operating a lumber yard and is liable only for a license under Schedule 83 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated May 5, 1939, which follows:

"Please advise me on the following:

"We have a party in this County that buys lumber from sawmills and resells this lumber to the retail trade. At times he receives orders from out of the county and delivers the lumber ordered to them. He has bought the necessary license to cover a Lumber Yard. Is he subject to any other license for these sales and if so, under what schedule is license due? In our opinion he has the correct license under Schedule No. 83 of the 1935 Revenue Code and is not due license under Schedule No. 84 of this code as he is not a Wholesale Dealer inasmuch as his sales are to the retail trade and are not for resale. Your advice as to whether or not additional license is due and under what schedule will be appreciated."

In my opinion, this person is operating a lumber yard, and is liable only for a license under Schedule 83 of the 1935 Revenue Act, which provides as follows:

"Schedule 83. For each person operating a LUMBER YARD; in cities of

| | |
|---|---|
| 100,000 and over | $75.00 |
| 35,000 to 100,000 | 40.00 |
| 7,000 to 35,000 | 25.00 |
| 1,000 to 7,000 | 10.00 |
| All other places whether incorporated or not | 5.00 |

"This shall not apply to regularly licensed sawmills selling lumber at retail at it or his plant."

He is not liable for a wholesale dealer's license under Schedule 84 of the 1935 Revenue Act, as he sells to the consuming public and not for the purpose of resale.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 31, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

1. There is no authority of law for making final record in a case where indictment is withdrawn and filed.

2. All the fees that can be collected where an indictment has been withdrawn and filed are such fees as accrued up to this time.

3. Where the clerk has collected fees for making final record in a case in which the indictment has been withdrawn and filed under the orders of the judge, such fees should not be charged back to him.

4. The fees of sheriff, witness and clerk which have accrued up to the time of the withdrawing and filing of the indictment become a legal claim against the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 12, 1939, in which you request my opinion as follows:

"Please refer to opinion of the Attorney General (Quarterly Report, Volume II, page 245), and opinion of the Attorney General under date of March 31st, 1939, addressed to the writer, relative to withdrawing and filing of indictments and advise me as follows:

"1. Can a Clerk of the Circuit Court make final record in a case where the indictment is ordered withdrawn and filed?

"2. Would usual fees, as used in the opinion of March 31st, 1939, be limited to fees of the Clerk that had accrued prior to the time the indictment was withdrawn and filed?

"3. In the event the Judge ordered that final record be made and the Circuit Clerk had collected fees for making same, would such fees be a legal and valid claim against the Fine and Forfeiture Fund, or should same be charged back to the Clerk?

"4. Would the fees of the Sheriff and witnesses that had accrued prior to the time the indictment was withdrawn and filed be a legal claim against the Fine and Forfeiture Fund?"

My answer to your first inquiry is in the negative. **Quarterly Report of Attorney General, Vol. II, page 245.**

My answer to your second inquiry is in the affirmative.

Your third inquiry has heretofore been answered in an opinion rendered to you under date of May 23, 1939, wherein it was held that generally there is no authority of law for making a final record in cases wherein indictment is withdrawn and filed, and the clerk is not entitled to compensation therefor, but when acting on order of the court he is entitled to such compensation. Therefore, in my opinion, the clerk would be entitled to such fee for making final record to be paid out of the fine and forfeiture fund, and same shall not be charged back to him.

My answer to your fourth inquiry is in the affirmative. See Section 4039 of the Code of 1923, as amended, where it says, " *** or where the indictment has been withdrawn and filed."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 31, 1939.

Hon. W. G. Tibbetts, Chairman,
DeKalb County Jury Commission,
Crossville, Alabama.

Jury Commissions—

1. Term year for members of jury commissions runs from the first Monday after the second Tuesday in January until the same time in the following year.

2. Members of said commission entitled to receive compensation as provided for in Section 5 of said Act.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of May 2, 1939, in which you request my opinion as follows:

"The Jury Commission bill approved March 2, 1939, provides by Section 5 that each member of the Jury Commission shall be paid $5.00 per day for the time actually engaged in the discharge of his duties, but the compensation of each member shall not exceed for **any year of his term** the sum of $200.00 in counties with population such as DeKalb County.

"When this Act became effective the old jury board had served seventeen days on the year commencing January 1, 1939, and the question now arises as to the number of days the new Jury Commission may be employed in this county during the remainder of this year.

"Does the expression 'year of his term' mean the year from date of appointment, or the calendar year? If it means the calendar year, shall the number of days used by the old board and the amount paid to it be taken into consideration by the new Jury Commission, or will each member of the new Jury Commission be allowed, if necessary, to serve during the balance of the calendar year until the full compensation of $200.00 is consumed?"

Act No. 59, General Acts of 1939, approved March 2, 1939, created Jury Commissions in all the counties of the State except Montgomery and Jefferson, and repealed all laws, general, local and special, in conflict therewith. Sections 1, 3, 5 and 25 of said Act read as follows:

"Section 1. That a Jury Commission be and the same is hereby established in every county in this State.

"Section 3. That within ninety days after the passage and approval of this Act, the Governor shall appoint the members of the several Jury Commissions who shall constitute said several commissions during the Governor's tenure of office and until their successors are appointed and qualified, and thereafter the Governor shall appoint the members of said Jury Commissions for and only during the tenure of office of the Governor making the appointment and until their successors are appointed and qualified.

"Section 5. Each member of the Jury Commission shall be paid the sum of Five Dollars ($5.00) per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the County treasury upon the warrant of the probate judge of the county. Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the Commission shall not exceed for any year of his term the following amounts, viz: In counties of twenty-five thousand population or less One Hundred Dollars ($100.00); in counties exceeding twenty-five thousand population Two Hundred Dollars ($200.00); in counties exceeding seventy-five thousand population Three Hundred Dollars ($300.00); and in counties exceeding seventy-five thousand population Six Hundred Dollars ($600.00); the population of said respective counties to be determined by the last preceding Federal census.

"Section 25. That all laws, general, local or special, in conflict with any of the provisions of this Act be, and the same are hereby repealed, it being the intention of the Legislature that the subjects covered by this Act be the exclusive law on such subjects, except that nothing herein shall be construed as repealing, modifying, extending or limiting in any way the Act of the Legislature of Alabama, approved October 7, 1932, appearing in Acts of Special Session of 1932, at page 89, et seq., nor the Act of the Legislature of Alabama, approved March 17, 1936, appearing in Acts of Special Session of 1936, at page 6, et seq., nor the Act of the Legislature of Alabama, approved July 15, 1931, appearing in General Acts of 1931, at page 455, et seq., nor the Local Act of the Legislature of Alabama, approved November 9, 1932, appearing in Local Acts of Special Session of 1932, at page 98, et seq., nor the Act of the Legislature of Alabama passed over the Governor's veto on June 18, 1931, appearing in General Acts of Regular Session of 1931, at page 301, et seq., but all of said Acts shall remain in full force and effect."

Upon the approval of this Act on March 2, 1939, it became effective immediately and the old Jury Commission in your county was abolished and the members of said commission no longer had any duty to perform.

Branch Bank of Mobile v. Murphy, 8 Ala. 119.

State v. Stearns, 200 Ala. 405; 76 So. 321.

Touart v. State, 173 Ala. 453; 56 So. 211.

At the same time a new commission was created whose members were to be appointed by the Governor within ninety days to serve during the tenure of his office. Section 3, supra. Section 2566 of the Code of 1923 fixed the term of office for the Governor and reads as follows:

"Section 2566. TERMS OF GOVERNOR AND OTHER EXECUTIVE OFFICERS—The Governor, lieutenant-governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, the president of the public service commission and two associate public service commissioners, shall hold their respective offices for the term of four years from the time of their installation in office, and until their successors shall be elected and qualified, such installation to take place on the first Monday after the second Tuesday in January next after their election."

Therefore, since the members of the Jury Commission are appointed to serve during the Governor's tenure of office, I am of the opinion that generally the "term year" would be from the first Monday after the second Tuesday in January until same time in the following year as this constitutes the "term year" for the Governor. However, the first term year of the members of the Commission would begin from the date of appointment and end the first Monday after the second Tuesday in the following January.

It is my opinion that compensation paid to members of the old Jury Board should not be considered in determining the amount due members of the newly created Jury Commission, but after that their compensation must be determined and paid as provided for in Section 5 of said Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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May 31, 1939.

Hon. M. E. Marlette,
Clerk, Circuit Court,
Lowndes County,
Hayneville, Alabama.

Clerks of the Circuit Court—Funds—

Not liable for loss of State funds which were stolen when due diligence was used in the safekeeping of same and loss was not due to negligence.

Opinion by Assistant Attorney General Screws.

**Dear Sir:**

I have your letter of May 22, 1939, in which you request my opinion as **follows:**

"Please refer to opinion of the Attorney General, Biennial Report 1930-32, page 560.

"On April 7, 1939, there was paid to me as Circuit Clerk of Lowndes County, Alabama, a fine amounting to $300.00. We have no Bank in Hayneville and for safekeeping the money in currency was locked up in my safe in my office.

"This fine was the State's money, but on the night of April 7, 1939, a burglar or burglars picked the combination and broke into my safe and took the money.

"I engaged and paid for personally a finger print expert in an effort to trace the burglar or burglars.

"The county officials here are all of the opinion I should be relieved of liability for the stolen money, and there is enclosed herewith a copy of a Resolution as spread upon the minutes of the Board of Revenue of Lowndes County, page 126, Minute Book 'E', recommending and endorsing that I be relieved of liability for the stolen $300.00.

"I shall appreciate your opinion at your earliest convenience."

In answer to your inquiry, I am of the opinion that, under the facts stated, you would not be personally liable for the $300.00 in question.

The rule in regard to the liability of an official for loss of public funds that are stolen is set out in the case of **State v. Houston,** 78 Ala. 576, as follows:

"If the collector, having exercised the highest degree of care, diligence and vigilance to prevent loss, is robbed of the public moneys by irresistible force, which he could not have foreseen or guarded against, this constitutes a good defense to an action on his official bond; but if the money of which he was robbed was not the same money which he had collected, or if he had committed an official default by his failure to pay the money into the treasury as by law required, such robbery would be no defense."

Applying the above rule to the facts presented in your inquiry, it appears that you used due diligence in the safekeeping of the funds in question and that the loss was not in any way due to your negligence or lack of due diligence. Therefore, it is my opinion that you are not personally responsible for said loss. **Biennial Report of Attorney General, 1930-32, page 560; Quarterly Report of Attorney General, Vol. VI, page 14.**

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 31, 1939.

Hon. I. J. Browder,
Personnel Director,
Capitol.

State Personnel Department—Authority to install Merit System—

Section 40 of the Merit System Act, when considered with other provisions thereof, authorizes State Personnel Department to proceed to the installation of the Merit System as early as it feasibly may be done.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of May 23, 1939, in which you request my opinion as follows:

"Will you please give me a ruling as to whether the last clause in the Merit System Act—or any other clause—precludes our putting the System in operation until **after the expiration of a period of twelve months,** in the event we should be ready at an earlier date?"

Upon careful examination of the act as a whole, including Section 40 referred to in your request, I am persuaded that it was not the legislative intention to deny to the State Personnel Department the authority and right to put the Merit System into full operation and effect as early as it feasibly may do so.

In the construction of statutes, the expositor is guided by certain canons of statutory construction which universally are observed by the courts. As here pertinent, they recently have been reaffirmed by the Supreme Court in **Henry v. McCormack Bros. Motor Co.,** 232 Ala. 196, 167 So. 276, as follows:

" 'Where the language of a statute is clear and the intent obvious, there is no room for construction; but where the meaning and intent are not obvious the court must attempt to arrive at the legislative intent.' City of Birmingham v. Southern Express Co., 164 Ala. 529, 51 So. 159, headnote 1.

"The legislative intent will be sought from the whole subject, where the language is not clear or obvious. Hamilton et al v. Pullman Car & Mfg. Corporation of Alabama (Ala. Sup.) 163 So. 329; Davis v. State ex rel. County Board of Equalization of Cherokee County, 16 Ala. App. 397, 78 So. 313.

"In determining the intent and purpose of an enactment, courts will look to the context and all of its provisions, and, if possible, give the act effect according to the legislative intent so expressed. Edwards v. Doster-Northington Drug Co., 214 Ala. 640, 108 So. 862; Armstrong v. Sellers et al., 182 Ala. 582, 62 So. 28.

"Where there is no doubt as to the meaning and intent of a statute by reason of the language employed, or arising from the context, courts may look to the history, conditions which led to that enactment, the material surrounding circumstances, the ends to be accomplished, and evils to be avoided or corrected, in order that the legislative intent be ascertained and given effect, if possible. McCreless v. Tennessee Valley Bank, 203 Ala. 414, 94 So. 722; Prowell v. State ex rel Hasty et al., 142 Ala. 80, 39 So. 164."

Measurement of the Merit System Act by these principles of statutory construction, in my opinion, ineluctably impels the conclusion that it was the intention of the Legislature that the Merit System should be put into full operation and effect as early as the machinery provided therefor could be put into efficient and intelligent operation. By Section 5 of the Act, which provides for the organization of the State Personnel Board, it is provided:

"Within thirty days after the passage of this Act the Governor, with the consent of the Senate, shall appoint the members of the Board. The first Board shall meet, organize and begin the discharge of its duties **within thirty days after its appointment.**"

By Section 12 thereof, it is provided:

"Section 12. CLASSIFICATION OF POSITIONS. The Director shall, **as soon as practicable after this Act takes effect,** ascertain and record the duties of each position in the state service and after consultation with appointing authorities and principal supervising officials, recommend to the Board a classification plan, together with proposed rules for its administration. Such classification plan shall show each class of position in the state service and when approved by the Board shall be made public, together with the rules for its administration. Each such class shall include positions requiring duties which are substantially similar in respect to the authority, responsibility, and character of the work required in the performance thereof and shall be designated by a title indicative of such duties. Each class shall be so defined that the same requirements as to education, experience, capacity, knowledge, and skill are demanded of incumbents for the proper performance of their duties, that the same tests of fitness may be used in choosing qualified appointees; and that the same schedule of pay can be made to apply with equity under like working conditions. The class titles shall be used in personnel, budget and financial records and communications. As far as practicable the natural or probable lines of promotion to and from the class of position shall be designated or indicated."

Section 14 thereof provides in part:

"Section 14. TESTS. (a) The Director shall conduct tests to establish Employment registers for the various classes of positions in the classified service. The tests shall take into consideration elements of character, reputation, education, aptitude, experience, knowledge, skill, personality, physical fitness, and other pertinent matters and may be written or oral or any other demonstration of fitness as the Director may determine. Public notice of the time, place and general scope of every test shall be given. (b) The Director, with the approval of the Board, shall determine the qualifications for admission to any test. For a promotion test, the qualifications shall include the requirement that an applicant be employed in a position in such class, and for such length of time, as the Director shall specify, subject to the rules. *** "

By Section 27 thereof it is provided:

"Section 27. STATUS OF PRESENT EMPLOYEES. Persons holding positions which come under the classified service as described herein at the time examinations are given may hold these positions until appointments can be made from employment registers. Such position holders passing such examinations, shall be given a regular status. Persons holding positions and not passing such examinations shall be replaced as soon as possible by certification of persons from the employment registers. The Director shall establish registers **within a reasonable time after the effective date of this Act.**"

Section 40 thereof, the language of which apparently raises in your mind the question of the authority of the Personnel Department to put the Merit System into immediate effect, provides:

"Section 40. EFFECTIVE DATES. This act shall become effective immediately upon its enactment, provided, however, that a period of twelve months shall be allowed in which to organize and prepare for the administration of the Merit System herein provided, and that during such period of twelve months the employees and appointeees of the State shall continue in all respects under and subject to the laws to which they are now subject."

(All italics supplied)

A casual reading of said Section 40, without taking into consideration the other portions of the Act, **possibly might** lead to the conclusion that its was the legislative intention to postpone the installation of the Merit System in Alabama for a period of twelve months next succeeding the date upon which the Act was approved by the Governor. The language therein employed, "that a period of twelve months shall be allowed in which to organize and prepare for the administration of the Merit System herein provided" clearly indicates the legislative intention that the State Personnel Department, if it found it necessary, might have as much as twelve months after the effective date of the Act within which to put the System into operation, but that it was its imperative duty to see that not more than twelve months expired before the System was installed and operating.

The next succeeding clause of Section 40,—"and that during such period of twelve months the employees and appointees of the State shall continue in all respects under and subject to the laws to which they are now subject,"—may tend to express a conflicting legislative intention.

However, measured by the rules of statutory construction, supra, that,

(1) "The legislative intent will be sought from the whole subject, where the language is not clear or obvious" and

(2) "In determining the intent and purpose of an enactment, courts will look to the context and all of its provisions, and, if possible, give the act effect according to the legislative intent so expressed" and

(3) "Where there is doubt as to the meaning and intent of a statute by reason of the language employed, or arising from the context, courts may look to the history, conditions which led to that enactment, the ma-

terial surrounding circumstances, the ends to be accomplished, and evils to be avoided or corrected, in order that the legislative intent be ascertained and given effect, if possible,"

it is clear that the purpose and intent of the Legislature was to establish a Merit System to improve the efficiency of officers and employees in the State Government and to install such a System as early as feasible, but that, in no event should the installation thereof be delayed more than twelve months from the date upon which the law was enacted.

In my opinion, the State Personnel Department has full authority to proceed, in the manner provided by the Merit System Act, to the installation of the Merit System as early as it may determine that such installation feasibly and practicably can be made.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 2, 1939.

Hon. Richard C. Foster, Pres.,
University of Alabama,
University, Alabama.

Colleges and Universities—University of Alabama—

Estate of deceased faculty member held entitled to receive from the University of Alabama that proportion of his stipulated compensation which the period of actual service of the deceased before his death bears to the services which he was to perform.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 16, 1939, in which you request my opinion as follows:

"A member of our faculty who was appointed and under contract to teach on the faculty of the University of Alabama for the regular session of 1938-39, consisting of approximately nine months, from September 1, 1938, to June 1, 1939, died shortly after May 1. He had thus completed eight-ninths of the service which he was to perform for the University.

"The agreed compensation for this period was $1,500.00 for the regular session nine months' work, or $750.00 per semester. The provision regarding payment was that payment should be made in twelve equal monthly installments of $125.00 each.

"It has been customary over a long period of time where a member of the faculty thus employed should for any cause terminate his connection with the University at the end of the first semester or first half of the nine months' period, that he receive an adjustment of his salary, whereby he would receive the equivalent of six monthly salary checks for the four and one-half months' service which he had performed, assuming, of course, that there was no breach of contract or no other circumstance affecting the satisfactory performance of the obligations of such faculty member.

"Will you please give me your opinion as to whether the estate of the deceased faculty member is entitled to receive from the University of Alabama that proportion of his compensation for such services which the period of actual service of the deceased before his death bears to the service which he was to perform; that is to say, whether since the deceased performed approximately eight-ninths of the service which he was to perform prior to his death, his estate would not be entitled to receive eight-ninths of the compensation for such services; deducting, of course, payments already received by him.

"Your earliest possible attention to this request for an opinion will be greatly appreciated."

This office in an opinion rendered to you under date of July 19, 1938 (Quarterly Report of Attorney General, Vol. XII, p. 67) set out the constitutional and statutory provisions of our laws relative to the management and control of the University of Alabama by its Board of Trustees. These provisions are found in Section 264 of the Constitution of Alabama and Section 549 of the Alabama School Code of 1927 and read, respectively, as follows:

"Section 264. The state university shall be under the management and control of a board of trustees, which shall consist of two members from the congressional district in which the university is located, one from each of the other congressional districts in the state, the superintendent of education, and the governor, who shall be ex officio president of the board. The members of the board of trustees as now constituted shall hold office until their respective terms expire under existing law, and until their successors shall be elected and confirmed as hereinafter required. Successors to those trustees whose terms expire in nineteen hundred and two shall hold office until nineteen hundred and seven, successors to those trustees whose terms expire in nineteen hundred and four shall hold office until nineteen hundred and eleven; successors to those trustees whose terms expire in nineteen hundred and six shall hold office until nineteen hundred and fifteen; and thereafter their successors shall hold office for a term of twelve years. When the term of any member of such board shall expire, the remaining members of the board shall, by secret ballot, elect his successor; provided, that any trustees so elected shall hold office from the date of his election until his confirmation or rejection by the senate, and, if confirmed, until the expiration of the term for which he was elected, and until his successor is elected. At every meeting of the legislature, the superintendent of education shall certify to the senate the names of all who shall have been so elected since the last session of the legislature, and the senate shall confirm or reject them, as it shall determine is for the best interest of the university. If it reject the names of any members, it shall thereupon elect trustees in the

stead of those rejected. In case of a vacancy on said board by death or resignation of a member, or from any cause other than the expiration of his term of office, the board shall elect his successor, who shall hold office until the next session of the legislature. No trustees shall receive any pay or emolument other than his actual expenses incurred in the discharge of his duties as such."

"Section 549. APPOINTMENT OF FACULTY.—The Board of Trustees have the power to organize the University by appointing a corps of instructors, who shall be styled the faculty of the University, and such other officers as the interest of the University may require; to remove such instructors or officers, and to fix their salaries of compensation, and increase or reduce the same at their discretion; to institute, regulate, alter, or modify the government of the University, as they may deem advisable; to prescribe courses of instruction, rates of tuition, price of board, and regulate the necessary expenses of students; and to confer such degrees as are usually conferred by similar institutions. They may delegate to the Faculty of the University or other officers, such powers and functions in the government of the students, and in the administration of the affairs of the University, as they may deem proper; but in no case shall any person be authorized to receive, hold or disburse any funds of the University without having first given bond, conditioned for the faithful discharge of his duties; and no person shall be excluded from the full benefit of the University Fund, or placed at any disadvantage in the pursuit of his studies, who possesses the requisite literary or other qualifications, and is willing to submit to the discipline prescribed for the students."

It is my opinion that these constitutional and statutory provisions vest the Board of Trustees of the University of Alabama, or its executive officers, with authority to contract with persons to teach as members of the faculty of the University of Alabama for a period of nine months, for a stipulated sum, said compensation to be paid to such persons in twelve equal monthly installments. Therefore, unless there are constitutional inhibitions against so doing, when a person who has been so contracted with by the Board of Trustees of the University of Alabama, or its executive officers, has taught a certain period of time prior to his death, for instance, eight-ninths of the time for which he had contracted to teach and then died, his estate is entitled to receive from the University of Alabama that proportion of his compensation for such services which his period of actual service bears to the services which he had contracted to perform, less, of course, the payments already received by him.

If there are constitutional inhibitions against so doing, they are found in Sections 68, 94, 97 and/or 98 of the Constitution of 1901. That none of these sections contains an inhibition against so doing seems to be authoritatively settled by our appellate court in the case of **Cobbs, City Treasurer v. Home Ins. Co. of N. Y.**, 18 Ala. App. 206, 91 So. 627, Cert. Den. 207 Ala. 712, 91 So. 922. In that case, an act providing for the creation of a so-called pension fund or system for the members of the fire department in various cities of a named class was attacked as being in conflict with those sections of the Constitution. In disposing of those contentions and resolving all questions in favor of the constitutionality of the act, the Court of Appeals spoke in pertinent part as follows (the language being affirmed by the Supreme Court):

"It is further insisted that the act as amended is void as being in conflict with sections 68, 94, 97 and 98 of the Constitution of 1901. It is contended for appellee that the act undertakes to create a 'pension sys-

tem' pure and simple, and to grant to members of the fire departments in the various cities, in the class named, extra fee or allowance, after service shall have been rendered or contract made. Cons. Section 68. The contract of service of members of the fire department is not for a fixed term, but is terminable at the will of either party, and therefore the salary or wage may be changed at any time, either by law, or by mutual contract, and a fireman remaining in the service of a municipality after the passage of a statute affecting his compensation is bound by the contract of service as governed by the law in force during the time of service. Every contract is made with reference to and subject to existing law, and every law affecting the contract is read into and becomes a part of the contract when made. This is true as between individuals dealing between themselves by contract and is also true as between individuals and government, where the contract is consummated, by an acceptance on the part of the individual of the terms of a statute proposing a status, which the individual may either accept or reject. Looking to the future, and not retrospectively the Legislature may provide a system, whereby municipalities, having under their jurisdictions millions of dollars worth of property liable to destruction by fire, can increase in efficiency a department designed to protect life and property, by providing for the members of its fire departments, their wives and little ones, after the term of active service has been ended, either by death or age, to the end that the public may retain in this hazardous service men of the most faithful and efficient class. Reasons in support of this proposition are too obvious to be stated in detail. The compensation thus paid, by whatever name called, is not a gratuity, but a part of the stipulated consideration, for which they contracted and served. Mahon v. Bd. of Education, 171 N. Y. 263, 63 N. E. 1107, 89 Am. St. Rep. 810; Exempt Firemen's Ben. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; State ex rel. Haberland v. Love, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. (N. S.) 607 Ann. Cas. 1912 C, 542; Taylor v. Mott, 123 Cal. 497, 56 Pac. 256. The section of the Nebraska Constitution (article 3, Section 16) discussed in the Love Case, supra, is very similar to section 68 of our Constitution, and the Constitutions of the other states discussed in the above-cited cases are of the same import. The case of State v. Ziegenhein, 144 Mo. 283, 45 S. W. 1099, 66 Am. St. Rep. 420, cited by appellee, stands alone against the great weight of authority. The law does not violate section 68 of the Constitution of 1901.

"The creation of the fund and the machinery for carrying out the provisions thereof is governmental, and hence does not violate section 94 of the Cons. 1901. State ex rel. Haberland v. Love, supra; Com. v. Walton, 182 Pa. 373, 38 Atl. 790, 61 Am. St. Rep. 712; Phoenix Assur. Co. v. Montgomery Fire Dept. 117 Ala. 631, 23 South, 843, 42 L. R. A. 468; Fireman's Ben. Ass'n v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Exempt Firemen's Ben. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; State v. Wheeler, 33 Neb. 563, 50 N. W. 770.

"From what has been said above it will be seen that sections 97 and 98 are not applicable to the case at bar. The amounts to be paid after death or retirement having been earned during the term of service, the Constitution does not prevent its payment at any time it may become due under the contract. Sections 97 and 98 are inhibitions against the payment for services not rendered.

"Besides, a fireman is not such an officer as is contemplated by the two sections named. To constitute a public officer, within the meaning of sections 97 and 98 of the Constitution, it is necessary that he have and

exercise certain independent public duties incident to an office created by law, carrying with it a part of the sovereignty of the state. A fireman is not such an officer. State ex rel. Attorney General v. Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723. And in Phoenix Assur. Co. v. Fire Department of Montgomery, 117 Ala. 631, 650, 23 South. 843, 849 (42 L. R. A. 468) it is said:

"'And the members of the companies are not servants, agents, or officers of the state or of the municipal corporation.'

"The cases cited are not in conflict. The case of Schmitt v. Dooling, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881, Ann. Cas. 1913 B, 1078, only going so far as to hold that a fireman was an officer in 'its broader sense,' which we take to mean for the purpose of the case then being decided."

We have quoted in ex tenso from that opinion but have deemed it advisable to do so because we think the observations there made in regard to that act are equally applicable to the authority of the Board of Trustees of the University of Alabama, or its executive officers, in the instant case. The observations there made by the court in regard to firemen apply with like force to members of the faculty of the University of Alabama. On the strength of that decision and the authorities therein cited and quoted from, we are of the opinion that the Board of Trustees of the University of Alabama, or its executive officers, have authority to contract with a person to teach as a member of the faculty for nine months for a stipulated sum, said compensation to be paid in equal installments of twelve months, and that in the event such person dies after he has performed a certain portion of the services which he had contracted to perform, instantly, eight months, his estate is entitled to receive from the University of Alabama that proportion of his compensation for the services which he had rendered which the period of actual service bears to the service which he had contracted to perform, that is, in the instant case, the estate of the deceased faculty member of the University of Alabama is entitled to receive eight-ninths of the compensation for his services which was provided for in his contract, with deduction, of course, being made for the payments already received by him. Such, in my judgment, would not conflict with any of the provisions of our Constitution.

Further authority for this conclusion is found in an opinion of this office rendered to Hon. Thomas E. Kilby, Governor of Alabama, Capitol, under date of November 18, 1921 (Biennial Report of Attorney General, 1920-22, p. 317) wherein we held that the Board of Trustees of Alabama Polytechnic Institute had authority to order that the salary of its deceased President Emeritus be paid to his widow for the remainder of the fiscal year during which he died. In an exhaustive opinion which set out the constitutional and statutory provisions in regard to the authority of the Board of Trustees of Alabama Polytechnic Institute, which constitutional and statutory provisions are similar to the constitutional and statutory provisions in regard to the authority of the Board of Trustees of the University of Alabama, it was concluded that such a payment or appropriation was not in violation of Section 97 of the Constitution of Alabama, supra, that there was no other constitutional inhibitions against such an appropriation, and that the Board of Trustees of Alabama Polytechnic Institute had the authority to make such appropriation on any one of three grounds, viz:

"That the exclusive control of said funds is by the Constitution placed within the discretion of the Board, the general power conferred

by Section 1902 of the Code (similar to Section 549 of the Alabama School Code of 1927, supra) supports it; and it is an implied adjunct of the power to employ and fix the compensation of officers and instructors of the institution."

Cf. also the opinion of this office to Hon. John A. Rogers, Member, Board of Trustees, Alabama Polytechnic Institute, Gainesville, Alabama, under date of July 17, 1928 (Biennial Report of Attorney General, 1926-28, p. 655).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 6, 1939.

Hon. John F. Steiner,
Deputy Director,
Personnel Department,
Capitol.

Merit System Act—

1. Member of Student Army Training Corps during the period of the World War is entitled to preference awarded veterans under Section 14(c) of Act No. 58, S. B. 44, approved March 2, 1939, known as the "Merit System Act."

2. The exemption of "heads of departments required by law to be appointed by the Governor", as used in Section 10(4) of Act No. 58, S. B. 44, approved March 2, 1939, known as the "Merit System Act", does not include department heads who are appointed by boards and commissions subject to the approval of the Governor.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 23, 1939, in which you request my opinion as follows:

"Please advise us whether a person who was a member of the Student Army Training Corps during the World War is entitled to the preference awarded veterans in Section 14, Subhead (C) of the Merit System Act.

"We should also like an interpretation of Article 4, Section 10 of the same Act. This exempts 'Heads of departments required by law to be appointed by the Governor.' Does this include department heads who are appointed by Boards and Commissions subject to the approval of the Governor?"

I am of the opinion that your first inquiry should be answered in the affirmative. Section 14(c) of Act No. 58, S. B. 44, approved March 2, 1939, known as the Merit System Act, provides in pertinent part as follows:

> "(c) All persons who have been honorably discharged from the Army, Navy or Marine Corps, who served in armed forces of United States during the period of a war, shall have five points added to their earned ratings in examination for entrance to the classified service; Provided, however, that such person be a qualified voter in Alabama or has been a resident of this State for two years next preceding his or her application; *** "

The Student Army Training Corps were part of the United States Army being established by statutory authority. All legally enlisted members of the Student Army Training Corps were in the Army and were given army discharges. This office has held that honorably discharged members of the Student Army Training Corps were exempt from payment of poll tax under Section 194½ of the Constitution, which constitutional provision is similar to Section 14(c) of the Merit System Act, supra. **Quarterly Report of Attorney General, Vol. I, page 338.**

If the party in question was a member of the Student Army Training Corps during the World War and has been honorably discharged therefrom, and either a qualified voter in Alabama or a resident for two years next preceding his application, he would be entitled to a preferential rating under Section 14(c) of the Merit System Act.

I am of the opinion that your second inquiry should be answered in the negative. Section 10(4) of the Merit System Act provides in pertinent part as follows:

> "Section 10. EXEMPT, CLASSIFIED AND UNCLASSIFIED SERVICE. Positions in the service of the State shall be divided into the exempt, the unclassified and the classified service. The exempt service shall include: *** (4) Members of Boards and Commissions, whether appointed or self-perpetuating, and heads of departments required by law to be appointed by the Governor."

"Heads of departments required by law to be appointed by the Governor" is not, in my opinion, tantamount to department heads who are appointed by Boards or Commissions subject to the approval of the Governor. In the first instance the Governor is the appointing power, and in the second instance the Board or Commission is the appointing power, and the Governor the approving authority.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 6, 1939.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Tax Assessors—

1. Under Section 27 of the 1935 Revenue Act it is the duty of the Tax Assessor to have printed, at the expense of the county, a sufficient number of assessment blank forms in the form furnished and prepared by the State Tax Commission, and the cost of said forms is a proper charge against the county.

2. If the county governing body fails or refuses to supply the Tax Assessor with all necessary books, stationery and printed blanks for the proper conduct of his office, pursuant to the provisions of Section 28 of the 1935 Revenue Act, the Assessor is not authorized to purchase stationery or employ help for his office and bind the county for the payment of the same.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 20, 1939, in which you request my opinion as follows:

"Under the General Acts of 1935, Sections 27-28, page 274, which reads as follows:

"'It is the duty of the Assessor to have printed, at the expense of the County, a sufficient number of assessment blank forms in the form furnished and prepared by the State Tax Commission, and upon request of any taxpayer, or State Deputy Tax Assessor the Assessor shall furnish him with a copy or copies for the use of such taxpayer in listing his property for taxation. Said blank forms when filled out and returned to the Tax Assessor shall be known as the Tax return." Upon demand of any person making a return of property for taxation, the Assessor shall furnish him with a copy of such return.

"'It shall be the duty of the courts of county commissioners or boards of revenue of the several counties in this State to supply the Tax Assessor, Tax Collector and such other tax officials or agents whose duty it is to assess and value property for taxation under this Article, with all necessary books, stationery and printed blanks for the proper conduct of their several offices.'

"Under the above sections of the Revenue Act, please advise if, when the Tax Assessor discovers that he has insufficient stationery or help and such help and stationery was refused him by the County Commission, whether or not he could then employ them of his own accord, and force the County Commission to pay for them.

"No such problem has arisen in this county but I am asking this opinion so that if it should arise, I would know how to proceed."

Section 27 of the 1935 Revenue Act reads as follows:

"Section 27. It is the duty of the Assessor to have printed, at the expense of the County, a sufficient number of assessment blank forms in the form furnished and prepared by the State Tax Commission, and upon request of any taxpayer, or State Deputy Tax Assessor the Assessor shall furnish him with a copy or copies for the use of such taxpayer in listing his property for taxation. Said blank forms when filled out and returned to the Tax Assessor shall be known as the 'tax return'. Upon demand of any person making a return of property for taxation, the Assessor shall furnish him with a copy of such return."

It is my opinion that, pursuant to the provisions of said section, you, as Tax Assessor, should have printed, at the expense of the county, a sufficient number of assessment blank forms in the form furnished and prepared by the State Tax Commission, and that the cost of said forms is a proper charge against the county. In such a case, the procedure for you to follow is to purchase the necessary assessment blank forms and have the person from whom you purchase the same to present his claim for payment to the county governing body of your county as any other creditor of the county is required to do and within the time prescribed by law. See opinions of the Attorney General to Hon. J. N. Gray, Chairman, Walker County Commission, Jasper, Alabama, under date of July 13, 1935 (Biennial Report of Attorney General, 1934-36, p. 226); to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of October 26, 1935 (Biennial Report of Attorney General, 1934-36, p. 357) and to Hon. John S. Golson, Judge of Probate, Butler County, Greenville, Alabama, under date of January 9, 1936 (Biennial Report of Attorney General, 1934-36, p. 455).

Section 28 of the 1935 Revenue Act reads as follows:

"Section 28. It shall be the duty of the courts of county commissioners or boards of revenue of the several counties in this State to supply the Tax Assessor, Tax Collector and such other tax officials or agents whose duty it is to assess and value property for taxation under this Article, with all necessary books, stationery and printed blanks for the proper conduct of their several offices."

If the county governing body of your county fails or refuses to furnish you with the necessary books, stationery and printed blanks (other than the blanks referred to in Section 27, supra) for the proper conduct of your office, as it is required to do by said section, you would not be authorized to purchase stationery or employ help of your own accord and thereby bind the county for the payment of the same.

This office recently had under consideration the question of whether or not a Tax Assessor could purchase pencils for the use of his office, if the Chairman of the county governing body had refused to issue a purchase order for said pencils, pursuant to the provisions of Section 28, supra, and the provisions of a local act not here applicable. In an opinion to Hon. J. W. Rutland, Tax Assessor, Colbert County, Tuscumbia, Alabama, under date of May 22, 1939 (a copy of which is enclosed for your information), we advised that:

"After a consideration of Section 28 of the Revenue Act, supra ***, I am of the opinion that you, as Tax Assessor of Colbert County, Alabama, have no authority to purchase supplies for your office (pencils). As heretofore pointed out *** it is the duty of the governing body of Colbert County to make purchases of supplies necessary for the proper conduct of your office *** ."

The holding of that opinion is equally applicable to your inquiry. We also refer you to the case of **Escambia County v. Dixie Chemical Products Co.,** 229 Ala. 287, 156 So. 631, which said case is cited in the opinion to Mr. Rutland, supra, as authority for this position.

In answering your inquiry, we have only considered the two sections of the 1935 Revenue Act which are set out hereinabove, since your inquiry only raised the question of your authority in this regard to those sections.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 7, 1939.

Hon. John Brandon,
Secretary of State,
Capitol.

Secretary of State—Public printing—Department of Finance—

On a recess of the Legislature for a period longer than thirty days, additional copies of the general acts passed and approved prior to the recess, upon the approval of the Director of Finance, may be collected and bound in pamphlet form and delivered to the Secretary of State.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

This will acknowledge receipt of your request for official opinion of April 28, 1939, which follows:

"Referring to our request of March 15th for opinion as to an interpretation of the last clause of Section 2931 of the Code of 1923, which reads as follows:

" 'provided, that if a recess be taken for a longer time than thirty days, that all of the general acts passed before the recess, shall be immediately printed, bound and delivered collected in pamphlet form.'

"In view of the fact that a great demand has been made on the 1250 copies of the General Acts which Section 2927 of the Code of 1923, as amended by the 1932 Acts, provides shall be sent to the Secretary of State for distribution, I doubt if we will have any pamphlet acts to furnish the members of the Legislature when they return in July. There has been an extra demand for these pamphlet acts also because of the split session. I believe in view of these demands, instead of merely complying with the above provision of having one copy prepared by the printer in paper bound form, a compliance with Section 2931 should be carried out in that 1250 copies of the pamphlet acts in paper, bound form should be carried out and distributed to the same officials as set out in Section 2927 of the Code. I am further of the opinion that the Legislature probably had in mind in passing Section 2931 that before the second session convened that the pamphlet acts passed at the first session would have been already distributed and could not be bound in paper binding, and that an additional 1250 copies should be printed in bound form.

"I call your attention to the estimate that the buckram bound acts will not be ready for distribution before January of 1940 and for the sake of convenience these pamphlet acts should be available in bound form."

The opinion heretofore rendered by this office under date of March 25, 1939, called for an interpretation of the last clause of Section 2931 of the Code of 1923, in regard to what it was necessary for the printer therein referred to, to do to comply with the requirements of his bond. You will note that this section is headed "Bond of Printer, Conditions of." In said opinion, it was ruled that only one copy of the general acts passed and approved by the Governor from January 10, 1939, to March 14, 1939, should be collected in bound form and delivered to you, in order for the printer to comply with the terms of his bond with the State of Alabama.

I am unable to find any law which gives you the right to have additional copies of the acts passed prior to the recess printed in pamphlet form. However, I am of the opinion that under Subsection 6 of Section 5 of the Department of Finance Act of 1939, approved March 17, 1939, the Director of Finance in his discretion may authorize you to have additional copies of the pamphlet acts printed and bound in pamphlet form.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 7, 1939.

Hon. D. M. Weakley, Supt.,
Alabama Boys Industrial School,
Birmingham, Alabama.

Alabama Boys' Industrial School—

Officers and employees thereof held not within the purview of the provisions of Act No. 138 (General Acts 1933, p. 124) approved April 14, 1933, commonly known as the Lapsley-Lusk Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have a letter under date of April 26, 1939, from the late Mrs. John D. McNeel, who was at that time President of the Board of the Alabama Boys' Industrial School, in which she requested my opinion as follows:

"By letter dated June 22, 1933, addressed to Hon. D. M. Weakley, Superintendent, Alabama Boys' Industrial School, Birmingham, Alabama, Hon. Thomas E. Knight, Jr., the then Attorney General, expressed the opinion that the Alabama Boys' Industrial School was subject to the so-called Laspsley-Lusk Act. **General Acts 1933, page 124.** It was his thought that Section 6 of that Act would apply, the general effect being apparently to reduce the compensation of employees of the school not to exceed 70% of twelve times the salary paid such employee for the month of September, 1932. Apparently the basis of the opinion was the statement: 'I am informed that the officers and employees of the Alabama Boys' Industrial School are officers and employees of a board of the State, either directly or indirectly.'

"I respectfully request that you reconsider that opinion since I believe it to be based upon a misconception of the circumstances.

"I wish to call your attention to the fact that the Alabama Boys' Industrial School is a separate and independent corporation of perpetual existence and possessed of the usual corporate powers. **Section 55 of the Code of 1923.** It is true that the business property and affairs of the corporation are under the management of its Board of Directors, but this Board of Directors is the governing body of that particular corporation and is not a 'board or commission of the state.' The officers and employees of the Alabama Boys' Industrial School are the employees of that corporation as such and are not the employees of a 'board or commission of the state.' I also call your attention to the fact that the Board of Directors of the corporation is a self-perpetuating body. **Section 56 of the Code of 1923.**

"In this connection, I wish also to call your attention to the annual appropriation, which is as follows:

> " 'There is hereby appropriated out of the general fund of the State of Alabama for the maintenance, support, insurance and upkeep of the Alabama Boys' Industrial School the sum of $100,000.00 annually to be drawn quarterly in advance by the Treasurer of the Board of the Alabama Boys' Industrial School, **and to be disbursed as directed by said Board. Any balance from this appropriation at the end of each year shall remain in the hands of the Treasurer of said institution and shall not revert to the state.'** (Acts 1935, page 797)

"The employees of the Alabama Boys' Industrial School are its own employees and have never been on the payroll of the State of Alabama, nor has any act of the legislature ever fixed the salary of any officer or employee of that corporation. The employees of that corporation have always been employed and their compensation fixed pursuant to the ac-

tion of its own Board of Directors. Neither the number of employees nor the salaries paid them can affect the funds in the State Treasury, since the appropriation is definite, and any possible unexpended balance does not revert to the general funds. A reduction of or a limit upon the salaries paid the employees of this corporation could not affect the general funds of the state.

"This situation now exists, and existed when this Act was passed, and I cannot believe it was the intention of the legislature to affect the salaries of the employees of this corporation by the general and inapt language of Section 6 of the Bill in question.

"Furthermore, from a practical standpoint, such an application of this Act would work a tremendous handicap on the school. Under such an interpretation the salaries of the majority of the employees would be below that generally paid clerical help. I am sure that I need not remind you of the high standard of character, ability and training necessary in the employees of this school if its functions are to be adequately executed.

"In view of these conditions, I shall appreciate your opinion whether the Act in question was intended to apply to the Alabama Boys' Industrial School."

In my opinion, the officers and employees of the Alabama Boys' Industrial School are not within the purview of Act No. 138 (General Acts 1933, p. 124) approved April 14, 1933, and the salaries of such officers and employees are not affected by the provisions of said act.

The so-called Lapsley-Lusk Act was "An Act to fix, limit and regulate the salaries and compensation of certain officers and employees of the state *** ." Said act specifically dealt with and fixed the salaries of most of the officers and employees of the State and of the various departments, boards and commissions thereof, and in Section 6 thereof the salaries of all other officers and employees of departments, boards or commissions of the State whose salaries or compensation were not specifically dealt with in the act were fixed in the following manner:

"Section 6. The maximum annual salary or compensation which may be paid to any officer or employee of any department, board, or commission of the State, whose salary or compensation is not hereinabove fixed, shall not exceed, seventy percent of twelve times the salary paid such officer or employee for the month of September, 1932. Provided however, that nothing in this act shall authorize the reduction of any compensation or salary below twelve hundred dollars per annum. Provided, further that this act shall not operate to increase the present salary of any officer or employee."

The officers and employees of the Alabama Boys' Industrial School were not specifically dealt with in said act, and, consequently, if they are within the purview of said act and the salaries of such officers and employees are fixed, limited or regulated by said act, it is by virtue of the provisions of Section 6, supra. If the officers and employees of the Alabama Boys' Industrial School are within the purview of the provisions of Section 6 of said act, it is because such officers and employees are officers or employees of a

"department, board or commission of the state." Otherwise, they are not within the purview of the provisions of said section, and their salaries are not fixed, limited or regulated thereby.

The Alabama Boys' Industrial School is a body corporate. Section 55 of the Code of Alabama, 1923. The business, property and affairs of the corporation are under the management and control of a Board of Directors. Section 56 of the Code of Alabama, 1923. The Alabama Boys' Industrial School is a public corporation created for the purpose of exercising, as an agency of the state, a purely governmental function, wise and beneficial. **Cf. White v. Alabama Insane Hospital,** 138 Ala. 479, 35 So. 454, and **Alabama State Bridge Corp. v. Smith,** 217 Ala. 311, 116 So. 695.

However, it is my opinion that the Alabama Boys' Industrial School, while a public corporation and an agency of the state, is not a "department, board or commission of the state" as those terms are used in Section 6, supra. In my judgment, the word "department" in said section was intended to mean a department such as the Convict Department (now the Department of Corrections and Institutions) which is specifically dealt with in said act; the word "board" in said section was intended to mean a board such as the State Board of Administration (now Department of Finance) which is specifically dealt with in said act; and the word "commission" in said section was intended to mean a commission such as the Alabama Public Service Commission, which is specifically dealt with in said act. In my judgment, none of these words, as used in said section, was intended to include public corporations of the State of Alabama, such as the Alabama Boys' Industrial School. The Alabama Boys' Industrial School is no more a "department, board or commission of the state" as those terms are used in said section than is Alabama College, which is a public corporation (Section 500 of the Alabama School Code of 1927), or the Alabama Polytechnic Institute, which is a public corporation, (Section 521 of the Alabama School Code of 1927) or the Board of Trustees of the University of Alabama, which is a public corporation, (Section 543 of the School Code of 1927), and it is a matter of common knowledge that the officers and employees of these public corporations or institutions have never been considered to be within the purview of said section, and that their salaries have never been fixed, limited or regulated by the provisions thereof.

The premises considered, it is my opinion that the officers and employees of the Alabama Boys' Industrial School are not within the purview of the so-called Lapsley-Lusk Act or any of its provisions, and that the salaries of such officers and employees are not fixed, limited or regulated by said act or any of its provisions.

No doubt the Legislature had in mind when it passed this act that the officers and employees of such public corporations were engaged by contract and that the amount of their salaries was necessarily fixed upon a competitive basis which must vary according to time and circumstances, and for that reason left (and we think wisely so) the fixation of the salaries of such officers and employees to the governing bodies of such public corporations.

The opinion of this office addressed to Hon. D. M. Weakley under date of June 22, 1933 (Office Edition Book 14, p. 272) which is referred to in your

letter of inquiry, erroneously assumed that the officers and employees of the Alabama Boys' Industrial School were officers and employees of a board of the state, either directly or indirectly, and upon such assumption held that they would be affected by the so-called Lapsley-Lusk Act. Said opinion is hereby specifically overruled.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 7, 1939.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

Jury Commissions—

1. Members of Jury Commission appointed under Act No. 59, General Acts 1939, approved March 2, 1939, are required to meet as soon as practicable and empty and refill jury boxes.

2. Such Boards are entitled to the sum of Five Dollars ($5.00) per day while performing such duties, subject to maximum limitations as provided in act.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of May 10, 1939, in which you request my opinion as follows:

"I will appreciate your opinion on the following:

"Under the new Jury Commission Bill (S. 55—Harris) a new Jury Commission has been appointed for Marshall County and they have gone to work revising the Jury Rolls and re-filling the Jury box.

"On Dec. 1st, 1938, (during this fiscal year), I paid the old jury commission for refilling the jury box.

"Now, what I want to know is, will I be authorized under the law to pay (again in this fiscal year), the new jury commission their per diem for this work."

It is my opinion that your inquiry should be answered in the affirmative.

Act No. 59, General Acts 1939, approved on March 2, 1939, created new Jury Commissions in all the counties of the State except Jefferson and Montgomery. The Act became effective on the day it was approved and by its provisions abolished the old Jury Commission then in existence. Sections 5 and 15 of said Act read as follows:

"Section 5. Each member of the Jury Commission shall be paid the sum of Five Dollars ($5.00) per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the County treasury upon the warrant of the probate judge of the County. Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the Commission shall not exceed for any year of his term the following amounts, viz: In counties of twenty-five thousand population or less One Hundred Dollars ($100.00); in counties exceeding twenty-five thousand and not exceeding fifty thousand population Two Hundred Dollars ($200.00); in counties exceeding fifty thousand and not exceeding seventy-five thousand population Three Hundred Dollars ($300.00); and in counties exceeding seventy-five thousand population Six Hundred Dollars ($600.00); the population of said respective counties to be determined by the last preceding Federal census."

"Section 15. The Jury Commission in each of the counties of this State shall meet as soon after the approval of this Act as is practicable and empty the jury boxes in their respective counties and from the new jury roll prepared as herein prescribed refill such jury boxes. Provided, however, that the provisions of this Section (15) shall not apply to those counties in the State having a population of Three Hundred Thousand (300,000) or more according to the latest Federal Census, and in which the Jury box or boxes have been legally filled within twelve (12) months preceding the approval of this Bill."

By the provisions of Section 15, the Commission was directed to meet as soon as practicable after the approval of the Act and empty the Jury boxes and refill the same from the new Jury roll prepared by them. This duty was imposed upon the new Commission in clear and distinct terms and was, therefore, mandatory. Under the provisions of Section 5 said members are entitled to the sum of Five Dollars ($5.00) per day while engaged in the performance of said duty, subject to maximum limitations as provided in act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 8, 1939.

Hon. James B. Little,
Commissioner of Building and Loan and
Director of Commerce,
Montgomery, Alabama.

Department of Commerce—Bureau of Building and Loan—Commissioner of the Bureau of Building and Loan may pay the funds

now in his hands and those funds hereafter coming into his hands which represent fees and assessments paid by building and loan associations of the State to the State Treasurer and said funds will be available to pay warrants properly drawn by the Comptroller to cover necessary operating expenses of the Bureau of Building and Loan.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion of March 28, 1939, which is as follows:

"Under the laws existing in this State prior to the passage of an Act creating a Department of Commerce and an Act creating a Department of Finance, there existed the Building & Loan Department. The law provided that the salary of the Commissioner and the compensation of the members of the Board, and all other salaries and expenses of the Department should be paid out of the fees and assessments collected from the associations, or out of the funds derived from the provision of the Act creating said Department. Under the recent Act creating the Department of Commerce of the State of Alabama, it was provided that the said Department should consist of the Bureau of Banking, the Bureau of Insurance and the Bureau of Building & Loan. All the powers and duties theretofore existing in favor of the Building and Loan Department were transferred to the Department of Commerce. There were appropriations made for the Bureau of Banking and the Bureau of Insurance, and these appropriations have been taken over by the Department of Commerce. However, there is no appropriation for the Bureau of Building & Loan.

"As Building & Loan Commissioner, I have on hand at the present time some $3,000.00. It is my desire to pay these funds, and all other funds coming into my hands arising from assessments, qualifying fees and penalties, to the State Treasurer and, subject to the approval of the State Comptroller, draw against these funds just as if an appropriation for the Bureau of Building & Loan had actually been made.

"If, under the Acts creating the Department of Commerce and the Department of Finance, this method of procedure could be adopted, would the State Treasurer be authorized to pay warrants drawn by the State Comptroller to cover the payment of the necessary operating expenses of the Bureau of Building & Loan, having the approval of the Director of the Department of Commerce?"

I answer your inquiry in the affirmative.

Your attention is called to an Act of the Legislature known as Act No. 14, House Bill 35, approved February 9, 1939, as amended by Act No. 170, House Bill 308, approved March 17, 1939, whereby the Department of Commerce of the State of Alabama was created. Section 2 of said Act, as amended, provides that the Department of Commerce shall consist of a Bureau of Banking, a Bureau of Insurance, and a Bureau of Building and Loan. It is further provided in Section 9 of said Act, supra, as follows:

"Section IX. All powers, authority, duties and functions by law vested in, conferred upon or required to be exercised by the Building and Loan Department of the State, the Building and Loan Board and the Building and Loan Commission are hereby transferred to, vested in and conferred upon the Bureau of Building and Loan of the Department of Commerce as herein created."

The powers, authority, duties and functions above referred to and which were transferred to, vested in and conferred upon the Department of Commerce are found in "The Building and Loan Act of 1931" as amended. (Sections 7111(1)-7111(45), Michie's 1936 Supplement to the Code of Alabama 1928). In said Act as amended, provision is made for the payment of certain fees and assessments by the Building and Loan Associations of the State to the Commissioner of the Building and Loan Department. These fees and assessments are for the privilege of doing business in the State of Alabama. Said Act, as amended, (Section 7111(10), Michie's 1936 Supplement to the 1928 Code of Alabama) further makes provision for the payment of the salaries of the Commissioner, the members of the board, and all employees and also all expenses of the department out of the fees and assessments collected from the Associations of the State of Alabama. This section, in my opinion, amounts to an appropriation of the fees and assessments collected for the purpose of carrying into effect the provisions of "The Building and Loan Act of 1931," supra.

This brings us to the question propounded by you, that is, may you as Director of Commerce and as such, the Commissioner of the Bureau of Building and Loan, take the funds which you now have on hand, which funds represent assessments and fees paid by associations of the State and all other funds coming into your hands from assessments and fees and pay the same to the State Treasurer and draw against these funds, subject to the approval of the State Comptroller, as if an appropriation for the Bureau of Building and Loan had been made? It is my opinion that you may follow this procedure and that the State Treasurer would be authorized to pay warrants drawn by the Comptroller to cover the payment of the salaries and necessary operating expenses of the Bureau of Building and Loan.

As heretofore stated, it is my opinion that the section of "The Building and Loan Act of 1931," supra, which provides for the payment of the salaries and expenses of the Building and Loan Department out of the fees and assessments paid by the associations of the state amounts to an appropriation. Therefore, when the Act creating the Department of Commerce, supra, was passed and became law the funds derived from said fees and assessments and which amounted to an appropriation for the Building and Loan Department were, by Section XI of the Department of Commerce Act, supra, transferred to and conferred upon the Department of Commerce. Said Section is as follows:

"Section XI. All books, records, accounts, documents, papers, furniture, fixtures, supplies, material, equipment and other personal property and all lands, buildings and other real property possessed or used by, and all appropriations made for, any department, board, bureau, commission, agency, or office of the State, the functions and duties of which are transferred upon the Department of Commerce by this Act, are hereby transferred and assigned to the Department of Commerce and **shall be delivered to or otherwise made available to the Director of Commerce upon his request.**"

It will be noted that the above quoted section, supra, provides that any appropriation transferred to and conferred upon the Department of Commerce **shall be delivered to or otherwise made available to the Director of Commerce upon his request.** It is, therefore, my opinion, under the authority given you as Director of Commerce under Section XI, supra, of the act creating the Department of Commerce, that you may pay the funds which you now have on hand in your capacity as Commissioner of the Bureau of Building and Loan to the State Treasurer and said funds will be available to pay warrants properly drawn by the Comptroller to cover necessary operating expenses of the Bureau of Building and Loan. Also, all other funds coming into your hands as Commissioner of the Bureau of Building and Loan arising from assessments and fees may be paid to the State Treasurer and will be available to pay warrants properly drawn by the Comptroller to cover necessary operating expenses of said bureau.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 8, 1939.

Hon. Marvin West,
Register, Circuit Court,
Morgan County,
Decatur, Alabama.

Trial Tax—

Act No. 296 (Local Acts 1931, p. 139) which became a law under Section 125 of the Constitution, does not provide for a trial tax in any cases docketed in said court, and no trial tax in cases docketed in said court may be imposed.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 23, 1939, in which you request my opinion as follows:

"I request your official opinion on the question whether a trial tax of $3.00 is required by law to be collected on cases filed on the Equity side of the Morgan County Court of Morgan County, Alabama, of which court I am ex officio Register.

"This court was established some years ago by a local act of the Legislature, and by an act passed at the regular session in 1931, which appears on pages 138-145 of the Local Acts of 1931, the original act was amended 'so as to read as follows': that is, the entire law governing the court is contained in the amendatory act. Equity jurisdiction was by this act for the first time conferred on this court; and Section 4 of the act provides that the Register of the Circuit Court shall ex officio be

Register of the Morgan County Court, and shall have the same powers and perform the same duties and shall be entitled to the same fees as Registers of the Circuit Courts. No trial tax on cases in this court is provided for by that act.

"The law providing for a trial tax in equity cases is contained on page 604 of the General Acts of 1931. It imposes the trial tax on every case on the docket of any Circuit Court.

"I have always understood that the $3.00 trial tax is a tax imposed for the raising of revenue, and is not embraced in the language of the local act creating the Morgan County Court; and that the act imposing the tax by its terms imposes it only on cases in the Circuit Court. But the suggestion has been made by the State Examiner that it is chargeable on all cases on the Equity side of the Morgan County Court.

"Please give me your opinion as to whether a trial tax of $3.00 should be charged on all cases on the Equity side of the Morgan County Court; and if so, shall it go to the State or shall it be divided between the State and Morgan County?"

In by opinion, your inquiry must be answered in the negative, i. e., you should not charge a trial tax in cases filed on the equity side of the Morgan County Court.

The presently applicable general law levying a trial tax is contained in Section 9 of the 1935 Revenue Act and reads as follows:

"Section 9. A trial tax of three dollars ($3.00) Dollars be, and the same is hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the **docket of any circuit court in this State,** to be taxed and collected as other costs, and when collected to be paid by the clerk or register of such court as follows: One-half (½) thereof into the general fund of the State Treasury, and the other one-half (½) into the general funds of the county in which the same is collected and for collecting and remitting such tax, the clerk or register may retain five per cent (5%) commission thereof. In all counties in this State where the clerk or register is paid on a salary basis under constitutional authority, the five per cent (5%) commission provided for by this Act shall not be collected, but such a clerk or register shall pay to the State and county respectively, each one-half of such trial tax. This trial tax fee shall not, however, be imposed or collected in cases made by any city, or town as a result of the filing by the clerk or other officer of such city or town with the Register of the Circuit Court or like officer of a court of the county having equity jurisdiction, of a list of delinquent taxpayers and property upon which city or town taxes are due as is now or may hereafter be required by law; nor shall said trial tax fee be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings in which said trial tax fee has been imposed, and cases for municipal assessments shall not be subject to such tax, and tax cases." (Emphasis ours)

You will note that this tax is only imposed in cases that go on the docket of any circuit court in this state. I have carefully read the act containing the entire law governing the County Court of Morgan County, which is

Act No. 296 (Local Acts 1931, p. 139) and became a law under Section 125 of the Constitution, and find no provision contained therein for the imposition of a trial tax in any case that goes upon the docket of said court. It is, therefore, my opinion that none can be imposed in any case that goes upon the docket of said court, and it necessarily follows that none could be imposed in a case filed on the equity side of said court.

This conclusion is in accord with the conclusion reached in an opinion of this office rendered to Hon. L. B. Clark, Clerk, Coffee County, Enterprise, Alabama, under date of September 12, 1931 (Office Edition, Vol. 6, p. 69) wherein we held that no trial tax could be imposed in cases upon the docket of the Inferior Court of Coffee County for the reason that the act creating said court made no provision for the imposition of such tax.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 8, 1939.

Hon. John H. Daniel, Clerk,
Circuit Court, Pickens County,
Carrollton, Alabama.

1. Costs and fees—Clerk's fees for making transcript in appeal cases when case is reversed, proper charge against fine and forfeiture fund.

2. Fine and Forfeiture Fund—Pickens County—Fine and forfeiture fund held abolished and fees arising against said fine and forfeiture fund held chargeable against general fund of Pickens County by operation of Local Acts 1907, page 500, Section 2.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 8, 1939, in which you request my opinion as follows:

"Please give me your opinion in the following case:

"One James Willingham was tried in the Circuit Court of my county in the fall of 1935 and convicted of murder in the 2nd degree, from which conviction the defendant appealed to the Supreme Court and the Supreme Court reversed the case.

"In the spring of 1937 he was tried again in the Circuit Court of my county and convicted of manslaughter in the 1st degree, from which judgment the defendant appealed to the Court of Appeals of Alabama and the Court of Appeals reversed the case.

"At the spring term of 1939 the case was nol prossed in the Circuit Court.

"Is the cost bill for making the transcripts a legal claim against the county as we have no fine and forfeiture fund in this county?"

In reply, I wish to advise you that the fees of the clerk for preparing transcripts as named by you in your request, constitute a legal charge against the "General Fund" of Pickens County. I wish to refer you to the Local Acts of 1907, page 500, Section 2, which provides as follows:

"Section 2. That the county treasurer of said county is hereby authorized and directed to place all moneys now or hereafter accruing to the fine and forfeiture fund of said county to the credit of the general fund of said county, and to pay state witnesses before the grand jury and the circuit court of said county their fees and all other claims now payable or hereafter payable out of such fine and forfeiture fund out of such general fund of the county."

You will note from the above-quoted section that by this local act your fine and forfeiture fund was abolished and the funds therein paid into the county's general fund against which fees of officers and witnesses, which fees would be a legal charge against the fine and forfeiture fund, must be charged. I wish to further refer you to an opinion of the Attorney General under date of October 27, 1937, addressed to Hon. E. T. Carpenter, Clerk of the Circuit Court, Washington County, reported in Quarterly Report of Attorney General, Vol. IX, page 49, which holds that the above-named fees for making transcripts on appeal constitute a legal charge against the fine and forfeiture fund of the county. Section 4039, Code of 1928, (Michie).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 3, 1939.

Hon. H. M. Hughes,
Clerk, Circuit Court,
Madison County,
Huntsville, Alabama.

Costs and Fees—Sheriff's, clerk's and witness fees held to be chargeable against fine and forfeiture fund of county when demurrers to an indictment are sustained.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request for official opinion under date of April 21, 1939, which is as follows:

"The Grand Jury returned six indictments against Defendant for Embezzlement. Defendant arrested, placed under bond, and cases set for trial. When case is called for trial, defendant's attorney files demurrers to the indictment. The Judge's order is as follows:

" 'Defendant demurs to the indictment and the demurrer is confessed by the State and sustained by the Court. Defendant not consenting to amendment of indictment, the prosecuting attorney, Hon. H. G. Bailey, moves the Court that the defendant be held under the present bond in this case to answer new indictment that may be returned against him by the next Grand Jury of this Court for the same offense charged in the indictment in this case.'

"Based on facts stated above, please advise promptly:

"1. Are Clerk's and Sheriff's fees accrued in these cases a legal claim against the Fine & Forfeiture Fund of Madison County?

"2. Are Witness fees in these cases a legal claim against the Fine and Forfeiture Fund of Madison County?"

In reply, I wish to advise you that in my opinion the fees herein referred to are legally chargeable against the fine and forfeiture fund.

I wish to refer you to the General Acts of 1927, page 45, which provides in part as follows:

"1. That Section 4039 of the Code of 1923 be, and hereby is, amended so as to read as follows to-wit: Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the State witnesses, the County Treasurer of such county must pay the fees of the officers of the Court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found', or in cases in which the State enters a nolle prosequi, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, unless the payment or distribution of such funds are otherwise provided for. *** "

I wish to further refer you to an opinion of this office written to Hon. Theo Hurt, Clerk of the Circuit Court, Perry County, under date of November 1, 1935, reported in Quarterly Report of Attorney General, Vol. I, page 155. This opinion, as you will note, holds that when a "complaint" against a defendant is quashed, the clerk's and sheriff's fees are chargeable against the fine and forfeiture fund of the county. In my judgment, the same holding must be true concerning an indictment which is found to be defective and demurrer thereto sustained by the court.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 8, 1939.

Hon. M. H. Hurt, Bookkeeper,
Macon County Board of Revenue,
Tuskegee, Alabama.

Act No. 577, General Acts 1931, page 669, creating a uniform system of accounting in the various counties in the State does not authorize county to pay for having the records kept in the sheriff's office.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of May 9, 1939, in which you request my opinion as follows:

"Under Section 2 of House Bill No. 49—establishing and maintaining a uniform system of accounting, etc.—Has the Board of Revenue or the Court of County Commissioners authority to pay for the keeping of these records for the Sheriff."

It is my opinion that your inquiry should be answered in the negative.

Sections 1, 2, 3, and 4 of Acts No. 26, General Acts 1935, page 43, creating a uniform system of accounting and reporting in the county offices of the State reads as follows:

"Section 1. That the State Comptroller, with the approval of the State Auditor and Chief Examiner of Accounts, is hereby required to prepare as soon as practicable after the passage and approval of this Act such forms of bookkeeping and accounting books, records, reports, and other blank forms as may be necessary for the installation of a uniform system of accounting and reporting in and for the County Offices of this State wherein the officers thereof are charged with any duties of receiving and disbursing public funds or other funds, and to transmit to such officers copies of such forms. The State Comptroller, with the approval of the State Auditor and the Chief Examiner of Accounts, may change or alter such forms from time to time as appears advisable to the State Auditor and the Chief Examiner of Accounts, having due regard in making such change, or changes, to the expense necessary in discarding the forms already on hand, and the use of forms as then prepared and required under this Act.

"Section 2. That all such County officers shall, after the provisions of this Act become of full operation and effect, be required to keep the accounts and make reports of their respective office in full accordance with the system of accounting and reporting so established and on the forms and records prescribed by the State Comptroller.

"Section 3. That the provisions of this Act shall become fully operative and effective and a Uniform System of Accounting and Reporting in County offices shall be established by October 1, 1936, and, after that date it shall be lawful for any county officer to wilfully fail or refuse to keep the accounts of his office or to make required reports according

to the system of accounting and reporting so established, which shall be the official system of Uniform Accounting and Reporting in County offices.

"Section 4. That any County Officer violating any of the provisions of this Act shall be guilty of a misdemeanor and on conviction shall be fined not less than $50.00 (fifty dollars) nor more than $500.00 (five hundred dollars). A continued failure and/or refusal on the part of such officer, to comply with the provisions of this Act shall subject such officer, as a liability on his official bond for neglect of duty, to a penalty of not less than $50.00 (fifty dollars) nor more than $100.00 (one hundred dollars) per month for the period of such failure."

Act No. 112, General Acts 1939, creates a Department of Finance for the State which is required to audit and examine the records and accounts of all State and County Officers, and to prepare forms for a Uniform System of State and County records and accounts as now provided by law. In said Act the office of State Comptroller is abolished and all duties and functions formerly conferred upon him are transferred to and conferred upon the Department of Finance.

Section 5, Subsection 15 and Section 11 of said Act read as follows:

"Section 5 (15). To examine and audit the records and accounts of all state and county officers, bureaus, boards, commissions, institutions and departments as now provided by law or which may hereafter be provided by law; and to prepare forms for a uniform system of state and county records and accounts as now provided by law."

"Section 11. ABOLITION OF THE OFFICE OF STATE COMPTROLLER, REPEAL OF SECTIONS 1 to 9-A OF THE BUDGET AND FINANCIAL CONTROL ACT; TRANSFER OF ALL FUNCTIONS AND DUTIES OF THE STATE COMPTROLLER AND THE OFFICE OF THE STATE COMPTROLLER TO THE DEPARTMENT OF FINANCE. The office of State Comptroller is hereby abolished. Sections 1 to 9-A, both inclusive, of the Budget and Financial Control Act, being Act No. 37, General Laws of Alabama, approved September 27, 1932, Acts of 1932, pp. 35-48, are hereby repealed. All functions and duties heretofore conferred upon the State Comptroller or the Office of the State Comptroller are hereby transferred to and conferred upon the Department of Finance. The Director of Finance shall serve in every capacity in which the State Comptroller has heretofore served. Without limiting the generality of the foregoing, he shall serve as a member of the State Board of Adjustment."

Prior to the passage and approval of the first act, the various county officers in the State were required to keep and maintain certain official records in their offices and no provision of law obtained as to what system or form of records they were to use. As a result of this, the officers of one county would use one system of keeping their records, while the officers in another county would use an entirely different system. There was no uniformity about the forms, systems, or methods used in the several counties. It was for the purpose of correcting this condition that the act in question was passed. This act did not increase the work or duties of any county officer in keeping his records.

Before the passage of this act, sheriffs were required to keep their own records and the fact that there is a uniform system in the several counties does not raise the presumption that the county must pay for someone to keep the records for the sheriff.

Whenever a Commissioners' Court or Board of Revenue or other like governing body does any act it must be able to point to some direct statute of law authorizing the same. The policy long adopted in this State is that the county can incur no liability, make no contracts nor do any act, regardless of the benefits that might result therefrom, unless the power to do so is derived from an express authority of law. They have no powers except those which are necessary for the performance of the governmental functions imposed upon them. **Mobile vs. Drago,** 172 Ala. 155, 54 So. 995; **Biennial Report of Attorney General,** 1918-1920, page 530; **Quarterly Report of Attorney General,** Vol. IX, page 35. The act in question does not authorize your county to pay someone to keep the records in the sheriff's office and I know of no other law authorizing it. Therefore, it is my opinion that the county governing body cannot pay for having the records kept in the sheriff's office.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 3, 1939.

Hon. Harry E. Smith,
Sheriff, Jefferson County,
Birmingham, Alabama.

Costs and Fees—Sheriffs—

A notice or letter written to a defendant against whom the sheriff holds an execution for costs is without authority of law and there can be no charge for same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 26, 1939, in which you request my opinion as follows:

"At your convenience, please advise me, as Sheriff to Jefferson County, Alabama, whether I am authorized to fix a charge of $1.50 for serving and returning a notice to a judgment defendant that an execution for costs has been delivered to me by the clerk of the circuit court, or of any inferior court of this county, which notice, in substance, states that within five (5) days from the date of same, a levy shall be made upon the defendant's property without further notice, unless the costs of court are paid within said five (5) day period.

"Please advise me further whether this charge may be made for such a notice being served upon the plaintiff where an execution for plaintiff's cost has been delivered to me by any such clerk, as set out above.

"Please advise me further whether such a fee, as set out above, together with the usual 25c fee for entering and returning papers on the sheriff's fee book, may be charged and collected when the executions for cost, as set out in the above paragraphs, shall have been recalled by the clerk of the court issuing same on order of a judge of any such court, subsequent to the service of such notices by me.

"If, in your opinion, the fees set out above, are legally and properly charged in all suggested cases, please so advise me. If same are illegally or improperly charged in any or all of the above-suggested cases, please set out in your opinion each such illegal or improper charge."

After receiving the above request, I wrote to you on May 3rd requesting that you cite me to the law authorizing fees you now seek to collect. On May 9th I received your reply to my letter of May 3rd but you failed to cite any authority for these fees or charges. I have searched for some law authorizing these costs, but have failed to find such a law. The section you cite, namely, Section 7287 of the Code of Alabama of 1923, as amended by Acts of 1931, page 261, is simply the schedule of fees allowed sheriffs and the items you point out do not cover the notice for which you are attempting to charge.

My impression of the citation of copy of notice you enclose, is that it is simply a letter or notice to the party against whom you hold an execution. In this letter you notify him that you hold an execution against him and that if same is not paid within five days you will levy under the same. I find no authority of law for such a paper. When you receive an execution, the law does not require you to give the defendant in execution any notice. Of course, if you desire to write this letter you have a perfect right to do so, but there can be no charge made for such a letter and it can not be listed as an item of costs. I call your attention to Section 3734, Code of Alabama of 1923, which is as follows:

"3734. No fee charged unless expressly authorized.—The law of costs must be deemed and held a penal law, and no fee must be taken but in in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

It will be seen that statutes on the subject of costs and fees are penal and must be strictly construed. **Burch v. State,** 55 Ala. 136; **Lee, Sills, et al. v. Smyley,** 16 Ala. 773; 42 Ala. 514.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 12, 1939.

Hon. W. T. Willoughby,
Sheriff, Morgan County,
Decatur, Alabama.

Sunday violation—Delicatessen—Restaurants—

Under Section 5539, Code of Alabama, 1923, keeping open of a mercantile establishment or store, for the purpose of sale of goods is prohibited.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated April 22, 1939, which is as follows:

"There have been several inquiries through my office as to what can be legally sold in stores operating under a delicatessen license on Sundays; as, loaf bread, sweet milk, fruit, cakes, etc.

"Please give me an opinion as to what can be legally sold in these stores on Sunday."

Code Section 5539 of the Code of 1923, which has to do with certain acts that are prohibited on Sunday, reads as follows:

"5539. Certain acts prohibited on Sunday; punishment.—Any person who compels his child, apprentice, or servant to perform any labor on Sunday, except the customary domestic duties of daily necessity or comfort, or works of Charity; or who engages in shooting, hunting, gaming, card playing, domino playing, or racing on that day; or who, being a merchant or shopkeeper, druggist excepted, keeps open store on that day, must be fined not less than ten nor more than one hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not more than three months; but the provisions of this section do not apply to the running of railroads, stages, or steamboats, or other vessels navigating the waters of this state, or any manufacturing establishment which requires to be kept in constant operation. Nothing herein shall prevent the sale of gasoline or other motor fuels or motor oils on Sunday."

The provisions of the above quoted Code Section are penal in character and must, therefore, receive a strict construction. **Flanagan v. Myer & Co.**, 41 Ala. 132.

You state in your request that the stores in question are operating as delicatessens, and I assume that they do not operate as a restaurant. It has been held in the case of **Whittaker v. State**, 17 Ala. App. 624, 88 So. 188, that the provisions of Section 5539 do not apply to restaurants.

I am therefore of the opinion that since the provisions of Section 5539 are penal in nature and must be strictly construed, the sale of any article

on Sunday by a store operating only as a delicatessen would be a violation of Section 5539 of the Code of 1923.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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June 12, 1939.

Hon. A. L. Hasty,
Judge of Probate,
Marengo County,
Linden, Alabama.

Filing tax—Mortgages—

When amount to be secured is unascertained at time of recording.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of February 9, 1939, which is as follows:

"I am herewith enclosing by registered mail an agreement between Mrs. Camilla B. Tutt and McDuffie Stallworth.

"Please render your opinion as to whether a tax should be collected on same. If so, mortgage or deed tax and amount that would cover same."

After carefully considering the agreement enclosed in your inquiry, it is my opinion that same is subject to the filing tax as set out by Schedule 94 of the Revenue Act of 1935.

The amount of the tax should be figured as by Schedule 94(b), which is as follows:

"If any part of the indebtedness which the mortgagor or debtor in any other instrument is authorized to incur under the terms of the instrument has not been, or will not be, presently incurred, at the time such instrument is offered for record, the tax shall be paid on the amount of indebtedness presently incurred, and the State Tax Commission, upon the petition of the owner of any such instrument, or upon the petition of the agent or attorney of such owner, shall ascertain to its own satisfaction the amount then taxable, and the amount to be incurred thereafter, and determine the amount upon which the tax shall be paid at the time such instrument is offered for record, and shall endorse its findings on such instrument. Upon the presentation of such instrument with such endorsement thereon, the Judge of Probate of any county in which the

instrument is offered for record upon the payment of the tax upon the amount so ascertained by the State Tax Commission and the recording fees of the Probate Judge, shall accept the same for record. The State Tax Commission shall also require the owner of such instrument to execute a bond, in an amount sufficient to secure the State the privilege tax to become due and payable under this section upon the amount of the indebtedness to be incurred thereafter, such bond to be approved by the State Tax Commission and payable to the State of Alabama, and conditioned that the owner of such instrument will promptly report to the said State Tax Commission and to the Probate Judge of the county where said instrument is first filed for record, whenever such owner or his successor in interest incurs any additional indebtedness thereunder, and the amount so incurred; and that the said owner of such instrument will pay or cause to be paid to the Judge of Probate of the county in which said mortgage is first filed the privilege or license tax required under this section, upon the accrual of any additional indebtedness, and that the said owner of such instrument will report to the said Probate Judge and the State Tax Commission during the month of September of each year the amount of all indebtedness and all bonds, debentures, notes or other forms of indebtedness, incurred or certified and delivered under said instrument to such date, and the amount so certified and delivered under such instrument prior to such year. The bond executed to secure payment of the tax herein required shall cover a term of five years and after the expiration of said term of five years, the owner of the instrument offered for record shall execute such further bond as may be required by the State Tax Commission covering the succeeding term of five years, and thereafter every term of five years, in the same manner so long as any of the indebtedness authorized to be incurred by such instrument has not been incurred with like condition and in such sum as the said Commission shall prescribe."

It is my opinion that Schedule 94(b) may be used in computing the amount of the tax because the whole amount is definitely not due at this time. However, if the party would prefer to pay the tax based on the $10,000.00 maximum loan, I think you would be authorized to collect it on that basis.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 12, 1939.

Hon. Grady R. Williams,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Deed Tax—Mortgage Tax—

Mortgage from Florence Cotton Mills to the Tennessee Valley Bank in the sum of $135,000.00, ninety per cent of which sum is furnished by the Reconstruction Finance Corporation, held subject to mortgage tax.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 21, 1939, in which you request my opinion as follows:

"There has been filed for record in my office a mortgage from Florence Cotton Mills to Tennessee Valley Bank in the sum of $135,000.00. The following is a correct copy of the first paragraphs:

"'THE STATE OF ALABAMA )
COUNTY OF LAUDERDALE )

"'THIS INDENTURE, made and entered into this, the 24 day of March, 1939, by and between Florence Cotton Mills, a corporation duly organized and existing under the laws of the State of Alabama and having its principal place of business in the City of Florence, State of Alabama, (hereinafter called the "Mortgagor") and Tennessee Valley Bank, a banking corporation organized and existing under the laws of the State of Alabama, and having its principal place of business at Decatur, Alabama, (hereinafter called the "Mortgagee");

"'WITNESSETH: That, whereas, the Mortgagor is justly and lawfully indebted to the Mortgagee, in the principal amount of One Hundred Thirty-five Thousand and No/100 Dollars ($135,000.00), for money this day loaned by the Mortgagee to the Mortgagor, which indebtedness is evidenced by note (hereinafter called the "Note"), executed by Mortgagor to Mortgagee of even date herewith, in said principal amount, payable as follows:'

"The Florence Cotton Mills tells us that while this mortgage runs to the Tennessee Valley Bank, ninety per cent of the money is being furnished by the Reconstruction Finance Corporation, a governmental agency, and that ninety per cent of the loan is governmental money on which the Mills are not due to pay the mortgage tax of $1.50 a thousand.

"Upon the assumption that ninety per cent of such money is government money and furnished by Reconstruction Finance Corporation, and upon the Reconstruction Finance Corporation certifying such fact to me, should I charge the full tax or charge the tax only on the ten per cent, which is being furnished by the Tennessee Valley Bank?"

In reply, I wish to advise that in my judgment the tax here considered should be charged upon the full amount of the mortgage offered for record. The fact that a part of the money is being insured by the Federal Government or furnished by the Federal Government does not affect the mortgage here considered. Neither of the parties to this mortgage are agencies of the Federal Government, as I understand the facts, and could not therefore be exempt from the payment of the mortgage tax on the theory that a burden is imposed upon or a tax levied upon the Federal Government or an agency thereof. The rule laid down in the case of **Federal Land Bank of New Orleans v. Crossland, Probate Judge,** 261 U. S. 374, is not applicable to the case here under consideration. As pointed out in your statement of facts, neither the mortgagor nor the mortgagee can claim immunity from the tax here levied,

since neither the Florence Cotton Mills, which is a corporation organized and existing under the laws of Alabama, nor the Tennessee Valley Bank, likewise organized and existing under the laws of Alabama, is a Federal agency. In my judgment, the fact that the Reconstruction Finance Corporation furnishes ninety percent of the money cannot influence the mortgage here considered since the Reconstruction Finance Corporation is not concerned with the document offered for record.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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June 13, 1939.

Hon. L. G. McPherson,
Clerk, Circrit Court,
DeKalb County,
Ft. Payne, Alabama.

Fine and Forfeiture Fund:

The fees of the official court reporter of the County Court of DeKalb County are not legal charges against the County Fine and Forfeiture Fund.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated April 6, 1939, which is as follows:

"Under Section 35, page 100 of Local Acts, 1927, provisions are made for a court stenographer and fee set at $5.00. Is this $5.00 fee a legal claim against the Fine and Forfeiture Fund where the cases are nolle prossed or dismissed without the stenographer taking any evidence? Also, in cases where the defendant was found 'not guilty' and testimony taken by the stenographer, would that claim of $5.00 be a legal charge against the Fine and Forfeiture Fund?"

In my opinion, your questions should be answered in the negative as the official court reporter of the County Court of DeKalb County is not an "officer" of the court within the perview of Section 4039 of the 1923 Code of Alabama, as amended by Acts 1927, p. 45, and, therefore, his fees cannot be legal charges against the County Fine and Forfeiture Fund.

Section 4039 of the 1923 Code of Alabama as amended provides as follows:

"4039. Surplus of fund to pay officers.—Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the County Treasurer of such county must pay the fees of the officers of the court arising from criminal cases in

which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found,' or in cases in which the state enters a nolle prosequi, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, unless the payment or distribution of such funds are otherwise provided for. This section shall be held to apply to all fees of officers of the trial court arising on an appeal by the defendant to the supreme court or the court of appeals, in cases where the judgment of the trial court is reversed and a new trial allowed, or the defendant ordered discharged. It shall also apply in appealed cases, where the defendant has appealed from conviction and sentence to the state penitentiary, and the conviction is affirmed, to such part of the fees of the officers of the trial court, arising on the appeal, as are not paid from the convict fund under sections 3667 and 3668 of the Code, an execution for such unpaid part of such fees having first been issued against the defendant and returned 'no property found'. It shall further apply to the fees of the officers of the trial court, arising on an appeal, in cases where the defendant has appealed from a conviction, the punishment fixed being otherwise than imprisonment in the state penitentiary, and the judgment of the trial court is affirmed, provided the defendant be first proved insolvent by the return of the execution 'no property found'."

Sections 34 and 35 of Act No. 179, H. 356, approved July 27, 1927 (Local Acts 1927, page 93) provide as follows:

"Section 34. That the judge of said court shall appoint a competent person capable of taking the proceedings of said court in shorthand as the official reporter for said court, and shall make an order of such official reporter, when so appointed, shall be removed by the Judge of said Court at his discretion, and his duties shall be the same as are now provided by law for the reporter, of the Circuit Courts of the State and he shall receive the same rate of compensation for transcribing the testimony or other proceedings as are now provided for said Circuit Court Reporter, but shall as a salary receive only the amount hereafter provided for in the next succeeding section hereof."

"Section 35. That in all cases in said Court, a Stenographer's fee of five dollars shall be charged and collected by the Clerk paid to the official Court Reporter appointed for said court; provided, however, that in cases where a money judgment is sought, in civil cases, of less than one hundred dollars as determined by the complaint, and in cases where there is a judgment by default, there shall be charged as stenographer's fee only two dollars and fifty cents."

I call your attention to the fact that the sections, supra, do not expressly provide that the court reporter may collect fees from the fine and forfeiture fund nor do they provide that the reporter shall be an officer of the Court, and the reporter is not given the power to administer oaths.

Official Court Reporters for the Circuit Courts in this State are made officers of the Courts by statute. See Section 6733 of the 1923 Code.

In **Hard, State Comptroller, v. State, ex rel. Owen,** 228 Ala. 241, 153 So. p. 725, the Court said:

"It seems to be well settled that one who performs a public function, and his authority is derived directly from the state by legislative enactment, and the law prescribes his duties, powers, and authority, such a one is a public officer of the state. State ex rel. Robertson v. McGough, 118 Ala. 159, 164, 24 So. 395; State ex rel. Winter v. Sayre, 118 Ala. 1, 31, 24 So. 89; Montgomery v. State ex rel. Enslen, 107 Ala. 372, 18 So. 157; Lacey v. State, 13 Ala. App. 212, 68 So. 706; Mechem on Public Officers, Secs. 1 and 2; Public Officers by Tharp, Sec. 3.

"'An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties'."

In **Harrington v. State ex rel. Van Hayes,** 200 Ala. 480, 76 So. 422, the Supreme Court of Alabama, relative to public officers, said:

"A public employment may be created by law, or by contract; but a public office can never be created by contract. Public officers are usually required to take an oath, and often, to make bond, and to keep an office or place of business; but none or all of these requirements do not absolutely determine whether or not a given employment is a public office, within the meaning of a given statute or constitutional provision. This is well stated, verified, and illustrated by notes and cited authorities in all the text-books on the subject of public offices."

In Robertson v. Ellis County, 84 S. W. 1097, 38 Tex. Civ. App. 146, the Court said:

"Now while the fact that the position of stenographer is designated in the act providing for its creation as an office, and that it declares that the person who may be called to perform its duties 'shall be a sworn officer of the court,' affords some reason for determining it to be such, still it is believed the place possesses none of those sovereign functions of the judicial department of the government to which it relates, to distinguish it from a mere employment to perform a species of service, under public authority, for the assistance and convenience of the court and parties litigant therein, in which no judicial discretion or judgment is involved. The creation of the position, as shown by the very terms of the act, was designed for no other purpose than to provide some one by whom the oral evidence offered, and other proceedings involving objections made to the admissibility of testimony, the ruling of the court, and exceptions thereto, might be taken in shorthand as a method of preserving those matters as they occurred, without delaying trials, to be afterwards transcribed and furnished the court and parties to the suit, to aid them in an accurate and prompt preparation of the record. The report or transcript of the proceedings by the stenographer is not binding, however, upon the court, and may be adopted or rejected at his discretion. No act which he is authorized to do is independent of the control of others, or vested in him as a power to be exercised as a right or prerogative of a judicial office. We conclude that while the position of a stenographer, under the statute in this state, may be, in a sense, an office, and the term thereof may continue for a longer period than two years, yet there is no such sovereign function of government embraced in the powers conferred upon the individual performing its duties as brings it within the meaning of the word 'office' as used in the section of the Constitution quoted."

In Tipton v. Sands, 60 Pac. (2) 622, the Supreme Court of Montana in 1936, said:

> "Furthermore, the Supreme Court reporter is not an office within the meaning of Section 35, article 8, above, as it lacks one of the elements of a public office, as defined by this court in the cases of State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A. L. R. 583,, and State ex rel. Nagle v. Page, 98 Mont. 14, 37 P. (2d) 575, in this: That the position does not possess a delegation of a portion of the sovereign power of the government, to be exercised for the benefit of the public."

In State ex rel. Appleman v. Conley, 178 N. E. 207, 124 Ohio State 265, the Supreme Court of Ohio in 1931 held that the official stenographer of the Court of Common Pleas of Richland County Ohio was not a public officer.

See Annotation in 53 A. L. R. 595, 93 A. L. R. 333 and 17 Am. Cas. 452, relative to public offices.

The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute. Key No. 181 Ala. So. Dig. cases cited thereunder.

In my opinion, the Legislature, in providing for a court reporter for the county court of DeKalb County did not intend for the reporter to be an officer of the court or it would have so provided in the statute creating the position.

The premises considered, it is therefore, my opinion that the fees of the official court reporter of the County Court of DeKalb County are not legal charges against the County Fine and Forfeiture Fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 14, 1939.

Hon. J. M. Holt, Chairman,
Board of Revenue,
Limestone County,
Athens, Alabama.

Counties—

1. Board of Revenue of Limestone County held without authority to call election to determine whether citizens of Limestone County desire to continue to elect the members of said Board by district vote or to elect them by county-wide vote.

2. Governor held to be without authority to call election to determine whether citizens of Limestone County desire to continue to elect the members of said Board by district vote or to elect them by county-wide vote.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 5, 1939, in which you request my opinion as follows:

"(1) Please give me an opinion as to whether the Board of Revenue of Limestone County has the authority to call an election to determine whether or not the citizens of Limestone County desire to continue to elect the members of the Board by a district vote or to elect the members by a county-wide vote.

"(2) In the event the Board of Revenue does not have authority to call such special election, please advise if the Governor has such authority.

"The Board has been petitioned by more than seven hundred legal voters to call an election to determine the sentiment of the electorate on this question.

"Since the election is proposed to be held July 11, 1939, an early reply will be appreciated."

The Board of Revenue of Limestone County is a creature of the Legislature having been created by Act No. 541, Local Acts 1931, page 258, approved July 11, 1931. This act was amended by Act No. 98, Local Acts 1936-37, page 53, which became a law under Section 125 of the Constitution. As amended, said act provides for the election of the members of the Board of Revenue of Limestone County by districts, Section 5 thereof, as amended, reading as follows:

"Section 5. That from and after the passage of this Act the Chairman of the Board of Revenue shall be nominated and elected by the voters of the entire county who are authorized to participate in any primary election, caucus or convention held or called by any political party for the nomination of said office. There shall be four members of the Board of Revenue, one to be elected from each District, and to qualify as a candidate for member of the Board of Revenue the candidate must be a qualified voter in the District from which he is a candidate. Each member of the Board of Revenue shall be nominated and elected by the voters of the District for which he is a candidate and no voter in the County shall have the right to vote for a candidate for member of the Board of Revenue except those running from the District in which he is a qualified voter."

The act creating said Board confers upon it in general terms all the jurisdiction, powers, authority or duties of county governing bodies in the State of Alabama. Said act, as amended, and the general laws of the State dealing with the powers and duties of county governing bodies, particularly Chapter 270, Article I, Section 6748-6772 of the Code of Alabama 1923, as amended, have been examined, and no authority has been found for the Board of Revenue of Limestone County calling an election to determine whether or not the citizens of Limestone County desire to continue to elect

the members of the said Board by a district vote or to elect them by a county-wide vote. Since county governing bodies have and exercise only such power and authority as is delegated to them by the Legislature, **Rhodes v. Marengo County Bank,** 205 Ala. 667, 88 So. 850, it is my opinion that the county governing body of your county does not possess the authority to call such an election.

On the power and authority of counties and county governing bodies generally, Mr. Justice Gardner spoke for the Supreme Court of Alabama in the case of **Tuscaloosa County v. Alabama Great Southern Railroad Co.,** 227 Ala. 428, 150 So. 328, as follows:

> "A county is but a governmental agency possessing no power and subject to no duty not originating from the law by which it is created, and in which its functions are defined. Whatever of power may be delegated to the county is the power of the state, and its nature is not changed by the delegation. State v. Butler, 225 Ala. 191, 142 So. 531; Askew v. Hale County, 54 Ala. 639, 25 Am. Rep. 730. A county has no inherent jurisdiction to make laws (Hill v. Moody, 207 Ala. 325, 93 So. 422, 423) *** ."

We know of no statutory authority that would give the Governor the right to call such an election. If there was purported statutory authority for the same, it would probably be unconstitutional as violative of Sections 42 and 43 of the Constitution which read, respectively, as follows:

> "42. The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

> "43. In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

As pointed out above, counties are created by the Legislature and are subject to its control, the Legislature being all powerful in this regard, except as limited by the Constitution.

The premises considered, you are also advised that the Governor of the State of Alabama is without authority to call an election to determine whether or not the citizens of Limestone County desire to continue to elect the members of the Board of Revenue of Limestone County by a district vote or to elect said members by a county-wide vote.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 15. 1939.

Hon. Robert L. Harrison,
Tax Collector, Butler County,
Greenville, Alabama.

Tax Collectors—Sale of Land for Taxes—Owner Unknown—

When lands are assessed to owner unknown, and it becomes necessary to sell such lands to satisfy state lien for taxes, two notices must be given as provided by Sections 218 and 224 of the Revenue Acts of 1935, General Acts 1935, page 256.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion, which is as follows:

"Inquiry as to land assessed to owner unknown.

"Should there be a notice through the paper notifying the party that he may appear and contest if he sees proper to do so and if no contest then advertise for sale. In short, should there be one or two notices put in the paper?

"It appears to me I would have to advertise notice and then advertise for sale. Please let me know at once as I am very anxious to settle this matter."

Section 218 of the Revenue Acts of 1935, page 353 of the General Acts of 1935, reads in part as follows:

"Section 218. When any assessment is made to an 'owner unknown', notice must be given by publication once a week for three (3) successive weeks, in a newspaper published in the county, or if no newspaper is published therein, by posting the same at the courthouse of the county for three (3) weeks, substantially in the following form: *** "

Section 224 of the Revenue Act of 1935, page 355 of the General Acts of 1935, reads in part as follows:

"Section 224. Immediately at the end of any term of court at which any decree for sales of real estate for the payment of taxes are rendered, or as soon thereafter as practicable, the tax collector shall proceed to enforce such decree by sales of real estate ordered to be sold, and to this end shall give notive for thirty days before the day of sale, by publication for three successive weeks in some newspaper published in the county, or at least three (3) weeks before the day of sale shall post a notice at the courthouse of his county, and at some public place in the precinct in which the real estate is situated, that at the time specified therein, he will proceed to sell such real estate separately, describing such portions as are embraced in each decree, and stating the amount for which each decree was rendered (without stating the items of which said decree is composed) and the person against whom the taxes embraced in such decree are assessed, or if assessed to 'Owner unknown', stating that fact. *** "

It will be noted from the above quoted portion of Section 218, that when lands are assessed to "owner unknown," that three weeks notice must be given, as therein provided, before a decree of sale can be entered.

After the decree for sale has been entered as provided by Section 223 of the Revenue Act of 1935, page 354 of General Acts 1935, it then becomes necessary to follow the provisions of Section 224, which provide that an additional three-weeks notice of the sale, as therein provided, must be given.

I am therefore of the opinion that when lands are assessed to owner unknown, before such lands may be sold for taxes, two sets of notices must be given—the notice as provided by Section 218 and the notice as provided by Section 224.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 16, 1939.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

1. Under Section 1445 of the 1923 Code, the county is authorized to pay expenses of conveying an insane person to hospital operated by United States Veterans' Administration or other United States agency.

2. Under Sections 1442 and 1444 of the Code, as amended by General Acts 1939, the Judge of Probate may commit insane person to a hospital operated by United States Veterans' Administration or other United States agency.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of May 13, 1939, in which you request my opinion as follows:

"The last session of the Legislature amended Section 1442 of the Code to provide for the admission of ex-soldiers to the U. S. Veterans Hospital on application to the Probate Judge. Section 1445 of the Code was not amended but provides for the County to pay the expenses of conveying the patient to 'the hospital.' It would seem that the two sections of the Code should be construed together, but before paying for the transportation of a patient to the Veterans Hospital I shall appreciate an opinion from you that the payment of such expense by the County is a proper expenditure of County funds."

Section 1442 of the Code of 1923 was amended by Act No. 126, General Acts 1939, by the addition of the following sentence to the section:

"Providing, however, if the investigation discloses that said patient is entitled to admission to a **hospital** operated by the United States Veterans Administration or other agency of the United States government, the Judge of Probate may cause to be executed and filed with the proper agency of the United States government, an application for admission of said patient to the proper government hospital." (Emphasis ours)

Section 1444 of the 1923 Code was amended by Act No. 131, General Acts 1939, by the addition of the following paragraph to the section:

"Provided, however, if said patient is entitled to admission to a **hospital** operated by the United States Veterans' Administration or other agency of the United States Government, the Judge of Probate, upon receipt of a certificate from the Veterans' Administration or such other agency showing that facilities are available and such person is eligible for care or treatment therein, may commit such person to said Veterans' Administration or other agency for care and treatment. Upon admission, such person shall be subject to the applicable regulations of the Veterans' Administration or other agency of the United States. The Chief Officer of any institution to which any person is admitted pursuant to commitment as provided in this Section, or under the law in effect at the time of such admission, shall have the same powers as are exercised by Superintendents of state hospitals for mental diseases in this State with respect to the retention, transfer, parole or discharge of the person so committed. The right of such person to appear and defend shall not be denied. The judgment or order of commitment by a court of competent jurisdiction of another state committing a person to the United States Veterans' Administration or other agency of the United States Government, or any institution operated by such agency, for care or treatment, shall have the same force and effect as to such person while in this State as in the State in which is situated the court entering such judgment or making such order. Upon receipt of a certificate that facilities are available in any such institution operated by the United States for the care and treatment of any person committed to the Alabama Insane Hospitals or any other institution in this State, and that such person is eligible for such care or treatment, the Superintendent thereof is hereby authorized to cause the transfer of any such patient to the Veterans' Administration or other agency of the United States Government. Upon effecting any such transfer, the Superintendent shall notify the committing court thereof: provided, however, that no such person shall be so transferred if he is confined pursuant to conviction of any crime or misdemeanor or if he shall have been acquitted of any such charge solely on the ground of insanity. Any person transferred as provided in this Section shall be deemed to be committed to the Veterans' Administration or other agency of the United States Government pursuant to the original commitment the same as if he had been originally so committed." (Emphasis ours)

Section 1445 of the 1923 Code, to which you refer, was not amended and reads as follows:

"Section 1445. Conveying patient to hospital.—The judge of probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital and all necessary ex-

penses incurred in coveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners."

It is my opinion that your inquiry should be answered in the affirmative. Under Section 1442 as amended, when any relative, friend, or other interested party desires to place a person in an insane hospital, he applies to the Judge of Probate, who must make an investigation and if he finds such person in need of such care, he shall make an application to the Superintendent at Tuscaloosa or other **hospital** operated by the United States Veterans' Administration or other agency of the United States Government for the admission of such person.

Under Section 1444 as amended, when the Judge of Probate is advised, in response to the application filed under Section 1442, that there is room available for the patient, he must make a further examination of the patient and if he believes such person to be sufficiently defective mentally to be sent to a hospital for insane persons, he shall make out two copies of mental disqualifications, one of which shall be kept in his file and the other sent with the patient to the hospital.

Section 1445 provides that the Probate Judge shall depute some person or officer to convey the patient to the **hospital** and that the necessary expenses incurred in conveying such patient to the hospital shall be paid out of the county treasury.

When Sections 1442 and 1444, as amended, are construed together, it is clear that it was the intention of the Legislature in amending said sections that Section 1445 should apply to both of them as amended. This being true, the county is authorized to pay for the necessary expenses of conveying a person to a hospital operated by the United States Veterans' Administration or other United States agency.

A fundamental rule of construction long established in this State is to ascertain and give effect to the intention of the Legislature as expressed in the statute. **Street vs. Cloe,** 207 Ala. 631, 93 So. 591; **Cheek vs. Odom,** 20 Ala. 31, 100 So. 782.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 16, 1939.

Hon. William J. Kern,
Clerk, Inferior Criminal Court,
Mobile County,
Mobile, Alabama.

Clerk of Inferior Criminal Court of Mobile County is not entitled to 5% commission on money collected for and remitted to the State, under Act No. 577, General Acts 1931, page 669.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of May 6, 1939, in which you request my opinion as follows:

> "Please do me the favor to give me your opinion at your earliest moment if I, the newly appointed Clerk of the Inferior Criminal Court of Mobile County, have the right under the law to deduct, for the use of Mobile County, 5% commission from all remittances, including Witness Fees, of Fines and Arrest Fees, sent to the State of Alabama."

It is my opinion that your inquiry should be answered in the negative.

Act No. 577, General Acts 1931, page 669, reads as follows:

> "Section 1. That the Clerks and Registrers of the several Circuit Courts of the State of Alabama shall receive five per cent of any sum or sums collected by such Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such Clerk or Register making the collection from such sum or sums collected."

and provides that clerks and registers of the several circuit courts of the State shall receive five percent commission on all money collected and remitted by them to the State. It will be noticed that said Act does not refer to clerks of any courts except the circuit court.

Act No. 588, General Acts of 1898-9, page 1164 creating the Inferior Criminal Court of Mobile County has been examined and nothing is found in said Act which would authorize you to deduct 5% commission on money collected by you and remitted to the State. We have also examined the amendments to said Act which were approved on February 21, 1907, August 26, 1927 and October 12, 1932, and likewise have found nothing in said amendments which would authorize you to deduct 5% commission.

In an opinion rendered by this office on December 7, 1932, to Hon. J. F. Wilson, Clerk of the Circuit Court of Randolph County, Wedowee, Alabama, which is reported in Reports of the Attorney General, Office Edition, Volume 12, page 231, it was held that clerks of inferior courts were not entitled to the same ex officio fees as clerks of the circuit court. While the facts in that opinion are not the same as here presented, yet the reasoning used there seems to support the conclusion herein rendered.

Any public officer claiming a fee, commission or compensation must be able to point to some clear and definite provision of law authorizing the same and such statutes are not to be extended, but must be strictly construed. **Troup vs. Morgan,** 109 Ala. 162, 19 So. 503; **State ex rel Holcombe vs. Stone,** 231 Ala. 245, 171 So. 366.

The premises considered, it is my opinion that you cannot deduct a commission of five percent on money collected by you for the State, since there is no provision of law authorizing the same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 16, 1939.

Hon. W. H. Quillen, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Where forfeiture is had against a defendant in a criminal case this is a civil action separate and apart from the original criminal case and therefore is subject to trial tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 22, 1939, in which you request my opinion as follows:

"I have just read the opinion of the Attorney General of Alabama dated June 7, 1937, and shown on page 186 of Vol. VII of Quarterly Report of Attorney General for the period from April 1, 1937 through June 30, 1937, relative to trial tax in forfeiture cases.

"John Doe was indicted by the grand jury in Franklin County on a charge of public drunkenness and the defendant was arrested on the warrant of arrest in said case and defendant was released from the custody on an appearance bond of $200.00. The said public drunkenness case was called for trial in the Law & Equity Court and the defendant failed to appear and the Court ascertained that the defendant has gone to Texas and a conditional forfeiture was entered against the bondsmen. A case was docketed against the bondsmen and notices of forfeiture issued against the bondsmen and served on them. At the next session of the court the public drunkenness case was called for trial and the defendant again failed to appear as he was still in Texas and the Court on motion of the Solicitor ordered the public drunkenness case withdrawn and filed. The Court made the forfeiture final and absolute against the sureties on the bail bond. In the John Doe public drunkenness case **no trial tax was imposed** because the defendant never appears for trial at any time and the case was withdrawn and filed. Should a trial tax be charged in the forfeiture case against the bondsmen, as no trial tax was imposed in the original case, which was withdrawn and filed?

"Section 9 of the Revenue Act of 1935 quoted from in the Attorney General's opinion, in part, as follows:

"' *** nor shall said trial tax be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings **in which said trial tax has been imposed,** and cases for municipal assessments shall not be subject to such tax, etc.'

"The original case against John Doe was withdrawn and filed and therefore no trial tax was imposed in the original case. Therefore, I think that the trial tax should be charged and collected in the forfeiture case against the bondsmen. What do you think about it,. I will appreciate an opinion."

In the case of **Copeland vs. Jefferson County,** 192 Ala. 12, 68 So. 285, our Supreme Court held that where a forfeiture is taken against a defendant and

bail in a criminal case such action is a civil proceeding and becomes a separate and individual proceeding from the original case, and that the forfeiture case against the defendant and bail must be docketed as a separate and independent proceeding. This being true, we hold that a forfeiture case, where such forfeiture involves more than $100.00, would carry trial tax under Section 6 of the act establishing the Law and Equity Court of Franklin County, Local Acts 1923, page 272, which is as follows:

> "Section 6. That the judge of said court shall receive a salary of Three Thousand Dollars per year, payable Two Hundred and Fifty Dollars per month, out of the general fund of the county treasury at the end of each month, payable on warrants drawn by said judge, and that there shall be taxed as a trial fee the sum of $5.00 in all cases, that goes upon the docket in said court where the amount involved is more than $100.00, and in actions of ejectment, unlawful detainer, forcible entry, and trials of the right of property, and in all criminal cases, and three dollars in all other cases to be taxed and collected as a part of the costs and said fee shall be taxed not only in all cases where there is a conviction for criminal offenses, but also in each case where the prosecutor is taxed with the costs. Said trial fee in all cases shall be paid by the clerk of said court into the county treasury for the benefit of the general fund."

We call attention to the fact that a forfeiture against the defendant and bail in a criminal case is a summary proceeding taken against the defendant anl his bondsmen for a breach of contract with the State which contract or bond assures the presence of the defendant in court to answer the charge against him, and, therefore, is not a proceeding in aid of the pending suit, but an independent action, a conditional judgment which may be made final on proper hearing after due notice. We call attention to opinions of this office to the Clerk of the Circuit Court of Marengo County, under date of June 7, 1937, Quarterly Report of Attorney General, Vol. VII, page 186 (Biennial Report of Attorney General 1936-38, p. 252), and to the Clerk of the Circuit Court of Sumter County, under date of June 14, 1938, Quarterly Report of Attorney General, Vol. XI, page 99.

The foregoing opinions, being in conflict with the views above expressed, are hereby overruled and held for naught.

I am of the opinion that you were in error in not charging a trial tax in the criminal case as it appears the case had already gone on the docket of the court. The trial tax becomes due on the docketing of the case.

The question as to what are or what are not ancillary matters does not come up in the matter you present here as we are holding that a forfeiture is a separate and independent procedure apart from the original case. This position is sustained in the case of **Copeland vs. Jefferson County**, supra.

This opinion is to be substituted for an opinion rendered to you on the 22nd day of May, 1939, wherein reference was erroneously made to the general statute relating to trial tax. This opinion deals with the provisions of your local act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 16, 1939.

Hon. W. B. Thrash,
Tax Assessor,
Cleburne County,
Heflin, Alabama.

Tax Equalization Board—Tax Assessor—

The Tax Assessor is not a member of the Tax Equalization Board, but is secretary of same.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of April 26, 1939, in which you request my opinion as follows:

"According to the Tax Equalization Bill, Senate Bill No. 14, section No. 6, the Tax Assessors are disqualified to be a member of this board.

"Please advise me if the secretary is a member of said board or not."

The question which you propound to us as set out above is answered by Section 8 of Act No. 143 of the Legislature of 1939, approved March 15, 1939, known as the Tax Equalization Bill. This section reads as follows:

"Section VIII. The County Tax Assessor shall be and serve as the Secretary of the County Board of Education but shall not receive any compensation for his services as such but have no vote nor voice in the government or business of said Board except as hereinabove provided."

It will be seen that the Tax Assessor is the secretary of the board but is not a member in any other capacity. He works with and under the direction of the Board of Equalization. His status is limited to his secretarial capacity.

I am enclosing a copy of an opinion recently rendered by this office which I think is pertinent to your inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 16, 1939.

Hon. E. C. Torbert,
Register, Hale County,
Greensboro, Alabama.

Costs and Fees—Trial Tax—

Trial tax being a part of the revenue of the State cannot be prorated as is the rule relating to costs, but must be paid in full.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 8, 1939, in which you request my opinion as follows:

"Please give an opinion as to the proper distribution of costs collected where the full amount has not been collected on executions issued to the Sheriff.

"The costs were divided equally by the Judge against Complainant and Respondent; executions were turned over to the Sheriff against both parties; the Sheriff sold a lot belonging to Complainant which brought $40.00, after deducting $14.25 for advertising, selling and fee for collecting he turned over to me as Register $25.75.

"The costs are as follows:

| | |
|---|---|
| Register's fees | $13.10 |
| Sheriff's fees | 11.25 |
| Stenographer | 5.00 |
| Witness fees | 42.55 |
| Trial Tax | 3.00 |
| | $74.90 |

"The execution against Respondent has been returned by Sheriff no property found.

"The Sheriff's fees listed here are due the Ex-Sheriff for his services."

I am enclosing herewith an opinion of this office rendered under date of March 31, 1939, to Hon. Howard Kirby, Clerk of the Circuit Court, Etowah County, which answers all of your request except the last item of trial tax. This office has held that trial tax is an item of State revenue. See opinion reported in Biennial Report of Attorney General 1930-32, page 703. This being true, I do not think that item can be included in a proration and would have to be paid out of any amount that might be collected. It is not a fee for services rendered but is a tax that must attach to every case that goes on the docket of the Circuit Court whether the case be criminal, law or equity.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 19, 1939.

Hon. H. W. McKenzie,
Treasurer, Marion County,
Hamilton, Alabama.

Witness fees—Criminal cases—

1. Loss of certificate where claim is registered.
2. Payment of registered claim is never barred.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of April 22, 1939, which is as follows:

"You will please give me your opinion as to how a person can get a witness claim paid where it is registered and the claim has been lost.

"Also will a witness claim that is registered run out of date?"

Where a witness claim in a criminal case has been registered and subsequently the certificate has been lost, it is my opinion that same may be paid upon the applicant filing an affidavit showing its loss and his or her right and title to the same. This is the method provided for in Code Section 7245 as amended by Acts 1939, Act No. 33, for securing payment in civil cases when a witness certificate is lost. Certainly this method is sufficient in criminal cases where a certificate has been issued and same has been registered before it is lost. Biennial Report of Attorney General, 1928-1930, page 14.

I am of the opinion that your second question should be answered in the negative. After a witness has received a certificate from the clerk and has registered same with the treasurer, such registered claim will not run out of date. There are various rules of law concerning the time within which witness claims in criminal cases must be presented, but it is my opinion that registration satisfies those requirements and once a claim is registered, payment of it will never be barred.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 20, 1939.

Hon. Francis B. Pratt,
County Superintendent of Education,
Bibb County,
Centreville, Alabama.

Schools—The premium on the bond of the Custodian of County School Funds may be paid by the Board of Education of said County out of the three-mill school tax.

Opinion by Assistant Attorney General Crosland.

**Dear Sir:**

I have your request for official opinion dated May 15, 1939, which is as follows:

> "According to Article XV, Section 298, Page 107 of the School Code of 1927 the bond of County Treasurer of School Funds shall be made at the expense of the County Treasurer of School Funds. Has a law been passed since this law was enacted which would allow me—as superintendent—to pay the bond of our Custodian of School Funds?"

It is my conclusion that your inquiry should be answered affirmatively.

Section 298 of Article XV of the School Code of 1927, Page 107, which provides that the bond of the County Treasurer of School Funds should be made at the expense of such County Treasurer of School Funds, was superseded by Section 20 of Act No. 191, General Acts of Alabama, 1933, page 203. Said Section 20 of Act No. 191, General Acts of Alabama, 1933, is in part as follows:

> " *** the premiums on the bonds of Superintendent of Education and of County Treasurer of public school funds shall be paid by the Board of Education of said County out of the three mill school tax and the premiums on all bonds of $1,000.00 or less shall be paid by the officer making said bond."

Section 1 of Act No. 507, General Acts of Alabama, 1935, Page 1090, amends Section 94 of the Alabama School Code of 1927, and provides that the County Board of Education shall appoint a Custodian of the Public School Funds of the County. This office has held that said Act No. 507, General Acts of Alabama, 1935, merely creates the office of Custodian of School Funds in lieu of the County Treasurer of School Funds, and only repeals laws or parts of laws in conflict therewith; and, therefore, the provisions of Act No. 191, General Acts of Alabama, 1933, not in conflict with Act No. 507, General Acts of Alabama, 1935, were not repealed. **Quarterly Reports, Attorney General, Vol. II, Page 29.**

The above referred to Act No. 507, General Acts of Alabama, 1935, is silent in regard to the payment of the premium on the bond of the Custodian of School Funds, and the provisions relative to the payment of the premium on the bond of the County Treasurer of Public School Funds contained in Act No. 191, General Acts of Alabama, 1933, supra, are controlling in that respect.

Therefore, it is my opinion that the premium on the bond of the Custodian of County School Funds should be paid by the Board of Education of said County out of the three-mill school tax.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 20, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Banks and Banking—Counties—County Depositories.

1. Under provisions of Act No. 134, General and Local Acts 1936-37, Extra Session, page 150, a State Bank is without authority to charge the state or a county exchange or handling charges for collecting or handling state or county warrants.

2. Under provisions of said Act, a State bank is without authority to charge a county exchange for remitting proceeds of a county warrant to New York to pay interest on bonds of the county.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated April 4, 1939, which is as follows:

"Please refer Act No. 134 (General Acts 1936-37, page No. 150) which prescribes certain duties of State Banks and advise me as follows:

"1. Can a State Bank legally charge a County exchange or handling charges on a County or State Warrant when same is handled for collection or credit?

"2. Can a State Bank that has been designated County Depository, legally charge a County exchange for remitting proceeds of a County Warrant to New York to pay interest on bonds of the County?"

I am of the opinion that your first inquiry should be answered in the negative.

The Act referred to in your request, found on page 150 of the General and Local Acts of Alabama, 1936-37, Extra Session, reads as follows:

"Section 1. That all banks incorporated under the laws of Alabama are hereby declared to be instrumentalities of the State. As such they are hereby required, in addition to all other duties now required of them, to perform for the State, and its subdivisions without charge the following services: (a) The handling and collection (or credit at the option of such bank) of all warrants issued by the State of Alabama, or by any county or other political subdivision thereof; (b) The handling and collection (or credit at the option of such bank) of all bonds and interest coupons thereto issued by the State of Alabama or any county or other political sub-division thereof; (c) Serve as paying agent for the State of Alabama when so requested by the State Treasurer.

"Section 2. It is the Legislative intent in passing this Act to relieve State Banks from any duty, obligation, responsibility or liability imposed upon them by what is known as the Unemployment Insurance feature of the Social Security Act, State and Federal, but nothing herein shall be construed to relieve such banks from any duty, responsibility, liability or obligation imposed upon them under any other State law now existing or that may be hereafter enacted.

Section 3. This Act shall be effective upon its passage and approval.

"Approved February 23, 1937."

One of the duties that the State banks are to perform for the State, under the provisions of the Act under consideration, free of charge, is the handling and collection of all State and county warrants.

The premises considered, I am of the opinion that a State bank cannot legally charge a county exchange or handling charges in handling for collection or credit a State or county warrant.

I am of the opinion that for the reason stated above, your second inquiry should also be answered in the negative.

It will be noted from subsection (b) of Section 1 of the Act under consideration, the State banks are to handle and collect, free of charge, all bonds and interest coupons thereto, issued by the State or any county, or any of the political subdivisions thereof.

In my opinion, the fact that the State bank remits the proceeds of a county warrant to New York to pay interest on a bond, instead of the warrant itself, would not alter the situation. This in effect would be handling the collection of interest coupons, as the word "handling" as used in this Act has a very broad meaning. **International Harvester Co. v. National Surety Company,** 44 Fed. (2) 746. Neither would the fact that the State bank in question has been designated County Depository alter the situation—the bank is still a State bank, and would come within the purview of the Act under consideration.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 20, 1939.

Hon. John C. Curry,
Commissioner of Revenue,
State Department of Revenue,
Capitol.

Refund of Income Taxes: Taxpayer has twelve months from the time of the payment of the taxes to file a petition with the Department of Revenue for a refund of income taxes paid through mistake or error.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated May 27, 1939, which follows:

"An opinion is requested as to the period of time from date of payment allowed taxpayers under the Statute in which to file petition for refund of income tax paid through mistake or error.

"There appears to be a conflict or inconsistency in Sections 345.36 and 345.40, fixing the time limit in which a taxpayer may legally file a petition for refund for income tax erroneously paid. To say the least of it, Section 345.40 is not any too clear, and since Section 345.36 refers to Act No. 432 of the General Acts of Alabama, approved July 17, 1931, it would appear that the section last written superseded the Act of 1931."

In my opinion a taxpayer must file his petition for a refund of income taxes paid through mistake or error with the Department of Revenue within twelve months from the time of payment of the taxes as provided by Section 345.36 of the 1935 Revenue Act, which provides as follows:

"Section 345.36. TAX PAID THROUGH MISTAKE OR ERROR. In case any taxpayer has through mistake or error paid an income tax which he is not legally due, or has paid an amount in excess of which he was in fact due, such taxpayer may make application on forms furnished therefor, to the State Tax Commission to have such amount erroneously paid refunded, and upon making satisfactory proof to the State Tax Commission shall certify to the State Comptroller the amount to be refunded by the State and warrant shall be drawn for such refund as provided in Act No. 432 of General Acts of Alabama, approved July 17, 1931."

Act No. 432, H. B. 888 approved July 17, 1931 (General Acts 1931, p. 527), provides in part as follows:

"Section 1. That where any taxpayer in the payment of taxes or licenses which are paid directly to the State Tax Commission, and where **by a mistake of fact or law has paid** an amount in excess of the amount due or has made an erroneous payment, the State Auditor is authorized to draw his warrant on the State Treasurer in favor of such taxpayer, and the State Treasurer is authorized to pay such warrant for the amount of such over-payment or erroneous payment."

"Section 2. Before any refund under this Section be made the taxpayer, his heirs, successors or assigns, shall file in duplicate, petition directed to the State Tax Commissioner setting up the fact relied on to procure the refunding of the money erroneously paid. **Such application must be made within twelve months from the date of such payment."** (Italics ours.)

In 59 Corpus Juris p. 1059 it is said:

"A statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or part adopted had been written into the adopting statute."

In Bachelor v. State, 216 Ala. p. 356, 113 So. p. 67, our Supreme Court said:

> "This act, by reference, adopts all of the provisions of article 7 of chapter 278 of the Code of 1907, and in construing the act these statutes are to be treated and considered as if incorporated into and formed a part of the act, and when so construed it is complete in itself, providing the method for the execution of convicts condemned to death by hanging up to and including the last day of February, 1927, and by electrocution after that date."

In my opinion the legislature by the wording of Section 345.36, supra, has incorporated by reference the provisions of Act No. 432, within said section just as if the Act had been copied in haec verba in this section.

However, section 411 of the 1935 Revenue Act provides as follows:

> "Section 411. That all laws or parts of laws in conflict with the provisions of this Act are hereby repealed, provided that all provisions of existing laws relating to taxation and revenue which are not in conflict with the provisions of this Act and which are not herein expressly repealed, are not hereby repealed."

Consequently, since the 1931 Act, supra, was part of the existing laws realting to taxation and revenue, and is not in conflict with the provisions of the 1935 Revenue Act, it is still a part of our existing statutory law and is applicable to all taxes paid to the State Tax Commission (State Department of Revenue). See Casmus v. Lee, 236 Ala. p. 396, 183 So. p. 185; and an opinion of this office to Hon. Henry S. Long, Chairman, State Tax Commission under date of August 18, 1938, Biennial Report of Attorney General 1936-38, p. 753, which holds that a taypayer who overpays mileage tax due by him because of a mistake either of law or fact may secure refund under provisions of Act No. 432, H. B. 888, approved July 17, 1931 (General Acts 1931, p. 527).

I do not believe there is any conflict between Sections 345.36 and 345.40 of the 1935 Revenue Act, as the latter Section applies to suits or proceedings in court, and not to petitions for refund to the Tax Commission or Department of Revenue.

The premises considered, it is therefore my opinion that a taxpayer must file his petition for a refund of income taxes paid through mistake or error with the Department of Revenue within twelve months from the time of payment of the taxes as provided by Section 345.36 of the 1935 Revenue Act and the 1931 Act, supra, therein referred to.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 22, 1939.

Hon. Clarence Abbott,
Tax Collector,
Shelby County,
Columbiana, Alabama.

Tax Sales—Notices thereof—Advertising cost. The cost for advertising notices of sale does not accrue until the notice has actually appeared in a newspaper.

Opinion by Assistant Attorney General McQueen.

Dear Sir:
I have your request for official opinion dated May 17, 1939, which is as follows:

"Will you please advise me as to when I should begin to collect the advertising cost of delinquent tax sale notices.

"I furnished newspaper copy for delinquent tax sale notices six days before the date of publication of the paper which is to contain sale notice, taxpayers come in and pay their taxes during those six days and the publisher of the paper insists that I collect for one week's insertion from all who have paid from the time copy was furnished until the paper is published.

"Does the fact that the notices are set up all along during the week, but not printed, make me responsible for advertising cost if I fail to collect. It would seem that the act was not completed until the paper was printed and in the mails.

"It is necessary to place the copy in the newspaper office some days in advance in order to give them time to set the matter up and read the proof."

I am of the opinion that under the facts stated in your request, neither you nor the taxpayers would be liable for any advertising cost.

The word advertise is defined in 2 Corpus Juris, page 294 as follows:

"Advertise. To give public notice of a thing; to announce publicly, especially by a printed notice; to publish notice of; to publish a written or printed account of."

From the above definition it can readily be seen that to advertise means to give actual notice to the public of the happening of an event or a thing, and the mere placing in the hands of a printer a copy of a notice to be later published, would not, in my opinion, amount to an advertising of the event or thing that is to happen in the future.

I call your attention to an opinion of this office under date of July 21, 1936, addressed to Hon. W. E. Butler, Judge of Probate, Madison County, found on page 72 of Vol. 4 of the Quarterly Report of the Attorney General,

in which it was held that the fees provided for under Section 217 and 239 of the 1935 Revenue Act did not accrue until the service therein provided for had actually been performed.

The facts in the above referred to opinion are analogous to the facts presented in your request, and as the service of the printer in your case has not actually been performed, this opinion of July 21, 1936, supra, fully answers your question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 22, 1939.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Birmingham, Alabama.

Circuit Clerks—Sheriffs—Subpoenas—Issuance thereof—serving thereof.

Under section 7734 of the Code of 1923 a Circuit Clerk must issue subpoena for witness on the request of either party, and even though the witness be a party to the action, clerk is entitled to fee for issuing such subpoena, and sheriff is entitled to fee for serving and returning same.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated April 27, 1939, which is as follows:

"Re: Case No. 102341 Foremost Dairies, Inc., a corp. vs. Nejieb Resha and M. H. Bite, a partnership doing business as Resha Plaza Market; and Resha Plaza Market, a corporation.

"Some days before the above case was set for trial the attorney for the defendant gave us a written order to summon Nejieb Resha, who appeared as one of the defendants in the above partnership, as a witness for the defendant. I issued the subpoena and it was duly served by the Sheriff. A few days before the case was called for trial the plaintiff's attorney took an order dismissing the case. He paid the costs under protest, saying he should not have to pay for the issuance and service of a subpoena bringing one of the defendants into Court. I told him it was not within the province of the Clerk to question why the defendant's attorney wished a subpoena issued for one of the members of the part-

nership which was named as one of the defendants in the case, but that it was the duty of the Clerk to summon whomsoever the attorney gave us a written order to summon. The plaintiff's attorney contends that I should have refused to summon the party above mentioned as he was listed as one of the defendants and then let the defendant's attorney file a mandamus proceedings to compel the Clerk to issue this subpoena.

"Please let me know if I did right in issuing the subpoena, and also if the witness-defendant would be entitled to claim his attendance as a witness in the case."

Your request presents for consideration two questions; namely;

1. Are you, as Circuit Clerk of Jefferson County, entitled to a fee for issuing a subpoena, at the request of Attorney for defendant, for a joint defendant, as a witness for defendant?

2. Is the sheriff of Jefferson County entitled to a fee for serving and returning such supoena?

Section 7734 of the Code of 1923 reads in pertinent part as follows:

"Issue of subpoena.—At the request of either party to a pending suit. his agent, or attorney, the clerk of the court **must** issue subpoena for witnesses." (Emphasis ours)

It will be noted from the above quoted portion of Section 7734, that no discretion is given to the clerk as to whether or not he will issue a subpoena at the request of either party. On the contrary, this Section provides that he **must** issue such subpoena. This, in my opinion, makes it mandatory on the clerk to issue subpoena for any person at the request of either party, and the fact that the subpoena in question was requested for one of the defendants, would not alter the mandatory provisions of Section 7734.

I am therefore of the opinion that it was your duty to issue the requested subpoena, and under Section 7278 of the Code of 1923 you are entitled to your fee for issuing such subpoena.

Under Section 10189 of the Code of 1923, it is the duty of the sheriff to execute and return all process and orders of the courts of record, and of officers of competent authority. It, therefore, follows, that since it was your duty to issue the subpoena in question, it was likewise the duty of the sheriff to execute and return the same. The sheriff under Section 7287 of the Code of 1923, would be entitled to his fee for serving and returning such subpoena.

If one of the defendants desired the attendance of his joint defendants as a witness on the trial of the case, the only way he could be assured that the joint defendant would attend, would be to have a summons issued for such joint defendant under the authority of Section 7734.

I am further of the opinion that on a dismissal of a case the defendant is entitled to have his cost taxed against the plaintiff. **Pritchard vs. Fowler, 146 Ala. 187, 40 So. 955.**

The fact that this case was dismissed prior to the day set for trial, does away with a necessity of answering your inquiry as to whether or not the defendant would be entitled to claim a fee for attendance in the case, as under the facts stated the question of attendance could not arise.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 22, 1939.

Hon. Forrest Castleberry,
Member, House of Representatives,
Conecuh County,
Castleberry, Alabama.

Statutes—Act No. 501, Local Acts 1927, page 367, approved September 9, 1927, held unconstitutional.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 13, 1939, in which you request my opinion as follows:

"Will you please advise me as to the constitutionality of the following act:

"'An act to fix the amount of the salary of the judge of the county court of Conecuh County, Alabama, to provide for the payment of said salary by warrants of said judge drawn on the treasury of said county and to make such warrants a preferred claim against the treasury of said county,' Approved Sept. 9, 1927.

"The act will be found in 1927 Local Acts, page 367."

The act to which you refer, and the title of which is set out in your letter of inquiry, is Act No. 501, Local Acts 1927, page 367, approved September 9, 1927, and reads as follows:

"Section 1. That there shall be paid out of the County Treasury of Conecuh County, Alabama, to the Judge of the County Court of said County an annual salary in equal monthly installments of $1200.00, which shall be in lieu of all fees or compensation allowed by law to such judge for services rendered in and about such County Court, the payment of such salary to be by warrant of such judge drawn on the treasury of the County. Such warrants shall be preferred claims against the treasury of said County.

"Section 2. This Act shall become effective on its approval by the Governor."

Article V of Chapter 113, Sections 3800-3845, of the Code of Alabama of 1923 contains the statutory law of this state on the subject of county courts. By Section 3801 thereof the judges of probate of the respective counties are made ex-officio judges of the county courts of their respective counties. By Section 3802 thereof their compensation as judges of the county courts is fixed. Said section reads as follows:

> "3802. Compensation of judges of county court.—Except as is otherwise provided by statute, since the 18th day of September, 1915, there shall be paid out of the county treasury to the judge of the county court, an annual salary in equal monthly installments of three hundred dollars in counties having less than twenty-five thousand population and in counties having twenty-five thousand population and less than thirty-five thousand population four hunded and fifty dollars and in counties having more than thirty-five thousand population, six hundred dollars, which shall be in lieu of all fees or compensation allowed by law to such county court or judge for services rendered in and about each county court; the payment of such salary to be by warrant of such judge drawn on the treasury of the county; the population to be determined by the last federal census preceding the time of the payment of fees. This section shall not repeal any statutes passed since the 18th day of September, 1915, which fixed the compensation or salary of judges of county courts."

This section is a codification of a part of an Act of 1915, General Acts 1915, page 603, which said act, prior to its codification, was held constitutional by the Supreme Court of Alabama in the case of **Hasty v. Marengo County Bank,** 204 Ala. 229, 86 So. 37.

The local act here under consideration has no other purpose, object or effect except to change the salary of the Judge of the County Court of Conecuh County from that provided for the judge of said court by Section 3802, supra. The constitutional validity of an act strikingly similar in language and identical in legal effect to the Local Acts of 1927, supra, was considered by the Court of Appeals and the Supreme Court of Alabama in **Acuff v. Weaver,** 17 Ala. App. 532, 86 So. 167. The act is quoted in the response of the Supreme Court to the question certified to it in said case by the Court of Appeals on the question of the constitutional validity of the same. We quote in extenso from the response of the Supreme Court and the opinion of the Court of Appeals in said case:

> "The local act approved September 2, 1919, applicable to Shelby County only, provides:
>
> > " '1. That all fees allowed in the county court of Shelby County, Ala., under and by virtue of sections 6655 and 6656 of the Code of Alabama, or any other provisions of law, be and the same are hereby required to be paid into the county treasury of Shelby County, Ala., as collected.
> >
> > " '2. That there shall be paid out of the county treasury of Shelby County, Ala., to the judge of the county court of Shelby County, Ala., an annual salary of $1,200.00 in equal monthly installments, which shall be in lieu of all fees or compensation allowed by law to such judge of said court for services rendered in and about such court; the payment of such salary to be by warrant of said judge

drawn on the treasury of said county, and such warrants shall be a preferred claim against the treasury of said county.

" '3. That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed.'

"Loc. Acts 1919, pp. 93, 94.

"What was said in Montgomery City v. Reese, 149 Ala. 190, 43 South. 116, is applicable here:

" 'Section 105, art. 4, of the Constitution, provides that "no special, private or local law except a law fixing the term for holding courts, shall be enacted in any case which is provided for by general law. *** and the courts, and not the Legislature, shall judge as to whether the matter of said law is provided for by a general law. *** Nor shall the legislature indirectly enact any such special, private or local law by the partial repeal of the general law." It is apparent that the subject-matter of the two acts is substantially the same; and it is equally apparent that the inhibition contained in the section of the Constitution quoted was violated by the enactment of the special or local law.'

"See, also, Norwood v. Goldsmith, Treas., et al., 168 Ala. 224, 53 South. 84.

"The question propounded by the Court of Appeals must therefore be given an affirmative answer. The local act is unconstitutional.

"ANDERSON, C. J., and McCLELLAN, SAYRE, SOMERVILLE, GARDNER, and THOMAS, JJ., concur.

" Opinion of Court of Appeals.

"BRICKEN, P. J. The constitutionality of an alleged local act approved September 2, 1919 (Local Acts 1919, pp. 93, 94), is one of the questions presented by this appeal.

"By a general act (Acts 1915, pp. 603, 604) the salary of the judge of the county courts of counties of a class that included Shelby county (between 25,000 and 35,000 population) was fixed at $450 per annum. The local act above referred to attempts to increase this amount to $1,200. So far as the judge of the Shelby County Court is concerned, this is the sole effect of this act. The salaries of the judges of such courts in all other counties of that class remain at the figure fixed by the general law.

"It is apparent that the subject-matter of the two acts is substantially the same. The local act is therefore violative of section 105 of our Constitution which provides that 'no *** local law *** shall be enacted in any case which is provided for by a general law. *** ' City of Montgomery v. Reese, 149 Ala. 190, 43 South. 116; Norwood v. Goldsmith, 168 Ala. 224, 53 South. 84."

On the basis of that authority and for the reasons therein given for the unconstitutionality of the act there under consideration, it is our opinion that said Local Act of 1927, supra, is likewise unconstitutional.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 22, 1939.

Hon. A. R. Forsyth,
Director of Finance,
Capitol.

Pension Commission—Officers constituting the Pension Commission are the Attorney General, the Director of the Department of Archives and History and the Director of the Department of Finance.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 26, 1939, in which you request my opinion as follows:

"As the Act creating the Department of Finance appears to be somewhat ambiguous in regard to the Alabama Pension Commission, I would respectfully request that you give me an opinion as to what officials now constitute the Pension Commission."

In reply, I wish to advise you that in my judgment the Alabama Pension Commission is composed of the Attorney General, the Director of the Department of Archives and History and the Director of the Department of Finance. Concerning the first two of the above named, I wish to refer you to Section 2933 of the Code of Alabama of 1923. You will note that the Section of the Code above referred to names the Director of the Department of Archives and History, the Attorney General and the Chief Examiner of Public Accounts, Ex-Officio, as members of the Alabama Pension Commission. By the General Acts of 1932, page 37 (Budget Act), all of the duties of the Department of Examiners of Accounts were transferred to the Department of the Comptroller. The question then arises as to whether this act then served to abolish the office of Chief Examiner of Accounts or did the office of Chief Examiner of Accounts become merged with the office of the Comptroller by this act. In my judgment, the same result would be reached in either event.

The pertinent provisions of the Budget Act are found on page 37 of the General Acts of 1932, as follows:

"The State Comptroller in addition to the following enumerated duties and powers, shall perform and exercise all the duties and powers heretofore imposed or conferred by law upon (a) the Department of Examiners of Accounts *** ."

It is necessary here to determine whether or not the Comptroller succeeds to the Pension Commission instead of the Chief Examiner of Accounts regardless of whether the office of the Chief Examiner of Accounts is abolished or merged with that of the Comptroller. The intent of the Legislature is the law. **City of Birmingham v. Southern Express Co.**, 164 Ala. 529, 51 So. 159.

The intent of the Legislature in the instant case is clear from the language of the Statute itself. The statute says that all the duties of the Department of Examiners of Accounts and its personnel are transferred to the office of the Comptroller. One of these duties is to serve as a member of the Pension Commission by the Chief Examiner of Accounts. This duty then must be transferred by the language of the Budget Act to the Comptroller. **L. & N. R. R. Co. v. Western Union Telegraph Co.**, 195 Ala. 124, 71 So. 118; **White v. City of Decatur**, 225 Ala. 646, 144 So. 872; **Hobbie Grocery Co. v. State**, 223 Ala. 151, 142 So. 46.

All particular rules of statutory construction are subservient to the end of determining legislative intent. **Middleton v. General Water Works and Electric Corp.**, 25 Ala. App. 455, 149 So. 351, cert. denied, 227 Ala. 219, 149 So. 352. With these rules of statutory construction in mind, we come to the conclusion that the Comptroller succeeds to the Pension Commission either because of the tranference or merger of the offices of Comptroller and Chief Examiner of Accounts or because of the transference of the duties of the office of Chief Examiner of Accounts to the Comptroller.

The Department of Finance Act of 1939, Act No. 112, H. B. 72—Dominick approved March 7, 1939, provides in part as follows:

"Section 7. ABOLITION OF THE DEPARTMENT OF EXAMINERS OF ACCOUNTS AND THE DIVISION OF DEPARTMENTAL AND COUNTY AUDITS IN THE OFFICE OF STATE COMPTROLLER AND THE TRANSFER OF THE FUNCTION AND DUTIES THEREOF TO THE DEPARTMENT OF FINANCE. The Department of Examiners of Accounts and the Division of Departmental and County Audits in the office of the State Comptroller are hereby abolished. Provided, however, that all of the powers, functions and duties of said department and said division as now provided by law or which may hereafter be provided except the powers, functions and duties with respect to Confederate pensions, as provided in the Alabama Code of 1923, Chapter 55, Article I (Sections 2933-2974), as amended, be and the same are hereby transferred and conferred upon the Department of Finance.

"Section 11. ABOLITION OF THE OFFICE OF STATE COMPTROLLER, REPEAL OF SECTIONS 1 to 9-A OF THE BUDGET AND FINANCIAL CONTROL ACT; TRANSFER OF ALL FUNCTIONS AND DUTIES OF THE STATE COMPTROLLER AND THE OFFICE OF THE STATE COMPTROLLER TO THE DEPARTMENT OF FINANCE. The office of State Comptroller is hereby abolished. Sections 1 to 9-A both inclusive, of the Budget and Financial Control Act, being Act No. 37, General Laws of Alabama, approved September 27, 1932, Acts of 1932, pp. 35-48, are hereby repealed. All functions and duties heretofore conferred upon the State Comptroller or the Office of the State Comptroller are hereby transferred to and conferred upon the Department of Finance. The Director of Finance shall serve in every capacity in which the State Comptroller has heretofore served. Without limiting the gen-

erality of the foregoing, he shall serve as a member of the State Board of Adjustment."

You will note that the duties of the office of Comptroller are transferred to the Department of Finance with the requirement that the Director of Finance "serve in every capacity in which the State Comptroller has heretofore served." The Comptroller has heretofore served as a member of the Pension Commission, having succeeded to the duties of the Chief Examiner of Accounts, as above noted, by the General Acts of 1932, page 37; but since the Act of 1939, above quoted, has abolished both the office of the Chief Examiner of Accounts and that of Comptroller and transferred the duties heretofore outlined for these offices to that of the Director of Finance with an exception which prevents the control of the affairs of Confederate Pensions and certain duties in connection with them from coming to the Department of Finance, it is my judgment that the Director of Finance has succeeded the Comptroller or Chief Examiner of Accounts as a member of the Pension Commission by operation of the above named law.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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June 22, 1939.

Hon. I. N. Hobson,
Clerk, Circuit Court,
Tuscaloosa County,
Tuscaloosa, Alabama.

Clerks of Circuit Court—Clerk of Circuit Court not entitled to deduct five percent commission as compensation when remitting fine or costs to a city treasurer which was collected in a case appealed from a Recorder's Court.

Clerks of Circuit Court—Clerk of Circuit Court of Tuscaloosa County, Alabama, not entitled to commission on Library Tax collected in case appealed from Recorder's Court.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion under date of May 25, 1939, which is as follows:

"Please answer as promptly as you can conveniently do so the following questions, namely:

"1. Upon the collection of a fine for the City of Tuscaloosa in a case appealed from the Recorder's Court of said City is the Clerk of the Circuit Court entitled to 5% commission on said fine and should the

Clerk deduct this amount from his remittance of the fine to the City Treasurer?

"2. Is the Clerk of the Circuit Court entitled to 5% commission on costs collected for the City of Tuscaloosa in cases appealed to the Circuit Court from the Recorder's Court of said City and should the Clerk deduct 5% from the costs when remitting said costs to the Treasurer of the City of Tuscaloosa?

"3. Is the Clerk of the Circuit Court entitled to 5% of Library Tax collected?

"The question has been raised as to whether or not this should be done and I shall be greatly obliged to you for ruling on these questions."

I answer your first and second inquiries in the negative.

Clerks of the Circuit courts are expressly authorized by law to deduct five per cent as their compensation from funds which they remit to the State and county. See Section 7278 (1) of Michie's Code of Alabama, 1936, Cumulative Supplement and Section 6724 (16) of Michie's Code of Alabama, 1928. There is, however, no express provision of law authorizing clerks of circuit courts to deduct a five per cent commission as compensation when remitting a fine and costs to a city treasurer which was collected in a case appealed from a Recorder's Court. The only provision with reference to clerks of courts remitting fines and costs to a city treasurer in a case appealed from a Recorder's Court is found in Section 1938, Michie's Code of Alabama, 1928, as amended by General Acts, 1935, page 1107. The pertinent part of said section, as amended, supra, is as follows:

" * * * but, if the judgment of such court is paid, the clerk of said court may receive such fine and costs and the defendant may be discharged, and such clerk must, under a penalty of five per centum per month thereon for failure to do so, pay said money to the treasurer of the city or town, or to the office corresponding to the treasurer thereof within thirty days after he receives it. His bondsmen shall also be liable for said penalty, and the amount thereof with the money collected may be recovered on motion after three days' notice."

It therefore follows that as there is no express provision authorizing clerks of circuit courts to deduct a five per cent commission as compensation when remitting a fine and costs to a city treasurer which was collected in a case appealed from a Recorder's Court that we must answer your first inquiry in the negative. It is the settled law of this State that the laws of costs and fees are strictly construed and that no fees are allowed except in cases expressly provided by law. **Section 3734, Code of Alabama, 1923; Troup v. Morgan County, 109 Ala. 162, 19 So. 503; Swindle v. Crocker, 217 Ala. 199, 155 So. 252.**

In answer to your third inquiry, I advise that this office in an opinion to Hon. James C. Brown, Register, Tuscaloosa County, Alabama, dated May 8, 1936, held that the register who collects the library tax on cases that go on the Equity docket of Tuscaloosa County is not entitled to commission on the

same. The holding in this opinion is equally applicable to the Clerk of the Circuit Court of Tuscaloosa County, Alabama and therefore, I answer your third inquiry in the negative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 22, 1939.

Hon. Joseph E. Killough,
Chief Clerk, Division of Labor,
Department of Industrial Relations,
Montgomery, Alabama.

Department of Industrial Relations—Sections 25 and 26 of Act No. 161, House Bill 51, approved March 14, 1939, expressly confers authority upon the Director of Industrial Relations and any authorized representative of the Department of Industrial Relations to inspect pay rolls and other records of employer's or owner's for the purpose of securing the amount of wages earned and hours worked by employees.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion of May 27, 1939, which is as follows:

"In our attempt to collect labor statistics relevant to wages, hours, and working conditions from the various industries in the State, our authority has been questioned and we wish to secure your opinion on Sections 25 and 26 of the Industrial Relations Act of 1939 which are as follows:

" 'Section 25. Duty to Furnish Information; Keeping of Records; Access to Records. Every employer, or owner, shall furnish to the Department of Industrial Relations or the Board of Appeals of any information which the Department of Industrial Relations or the Board of Appeals is authorized to require, and shall make true and specific answers to all reasonable questions, whether submitted orally or in writing, authorized to be put to him. The Director of Industrial Relations and any authorized representative of the Department of Industrial Relations shall, for the purpose of examination, have access to and the right to copy from any book, account, record, pay roll, paper or documents relating to the employment of workers in such manner as may be reasonable and at reasonable times. Information secured under the provisions of this section or section 10 (g) of Unemployment Compensation Act, as amended, shall not be published or be open to public inspection in any manner revealing the employer's or owner's identity; and any officer, member or employee of the Department of Industrial Relations or the Board of Appeals guilty of violating this provision shall be subject to the penalties

provided in this Act. Nothing in this section shall be construed to limit or restrict the provisions of Section 10(g) of the Unemployment Compensation Act, as amended, imposing duties upon employers or granting powers to the Director of Industrial Relations, as successor to the Unemployment Compensation Commission.'

" 'Section 26. Right of Entry. The Director of Industrial Relations or his authorized representative shall have the power and authority to enter any place of employment, place of public assembly, or public building for the purpose of collecting facts and statistics relating to the employment of workers or for the purpose of making inspections to determine whether or not the labor law and laws relating to the relationship between employer and employee and the rules and regulations adopted pursuant to the provisions of this Act are being observed. No employer or owner shall refuse to admit the Director of Industrial Relations or his authorized representative to his place of employment, public building or place of public assembly for the purpose of making any reasonable inspection or impede or obstruct him in making any reasonable inspection.'

"We are interested in determining whether or not we have the authority under these two sections of the Act to inspect pay rolls and other records for the purpose of securing the amount of wages earned and the hours worked by employees. All information collected will be held in the strictest confidence. Any statistics published will in no way be identified with the name of the employer.

"We shall appreciate your rendering this decision as soon as possible in order that we may make any necessary adjustments in our statistical study."

You request our opinion as to whether the Department of Industrial Relations has the authority to inspect pay rolls and other records of employer's or owner's for the purpose of securing the amount of wages earned and hours worked by employees.

We answer your inquiry in the affirmative. Sections 25 and 26 of Act No. 161, House Bill 51, approved March 14, 1939, as set out in your inquiry expressly confers this authority upon the Director of Industrial Relations and any authorized representative of the Department of Industrial Relations.

We call attention to the fact that all information secured under said sections, shall be kept in strict confidence and shall not be published or be open for public inspection in any manner revealing the employer's or owner's identity.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 22, 1939.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

School Busses: Privately owned school busses, operated in a county for other purposes than transporting school children, should be licensed as motor busses under subsection (a) of Schedule 158.3 of the 1935 Revenue Act, as amended by Act No. 530, H. 921, approved September 14, 1935, (General Acts 1935, page 1118).

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated April 29, 1939, which is as follows:

"Please refer to Schedule 158.3 of the License or Revenue laws of 1935, subsection (c) and advise me just what is meant by said subsection.

"We have a large number of school busses in this county, who, on Saturdays make a practice of bringing their neighbors to town in their school busses, sometimes making a charge and sometimes merely bringing them for the gasoline and oil expense.

"It has been the practice of this and other counties to issue these school busses X-5 tags, charging therefor the sum of $30.50, and which we have been informed or have understood would protect them in operating thus on the basis of a part time taxi.

"The school busses referred to are owned by individuals who drive them. We have several of these busses in this County and it has been the practice in this county for several years to issue X-5 tags for them which we understand would authorize them to operate over the public highways for other purposes than transporting school children. They are in no sense a part of a taxicab system. They do not operate these busses over routes covered by Public Service Commission permits or franchises. What they do is merely to bring a load of their neighbors to town, of course charging a small sum for the service."

In my opinion, the privately owned school busses, operated in a county for other purposes than transportation of school children, should be licensed as motor busses under subsection (a) of Schedule 158.3 of the 1935 Revenue Act, as amended by Act No. 530 H. 921 (General Acts 1935, p. 1118), approved September 14, 1935.

I do not believe that the busses are operated as a part of a taxicab or similar system, so as to come within the purview of subsection (c) of Schedule 158.3, which provides as follows:

"Schedule 158.3 (c). For each motor vehicle operated as a part of a Taxicab, or similar system, the following license tax shall be charged: (a) For each automobile not exceeding 2500 pounds in weight, Eleven and 25/100 Dollars ($11.25); (b) For each automobile weighing over 2500

pounds, but not exceeding 3000 pounds in weight, sixteen and 75/100 Dollars ($16.75); (c) For each automobile weighing in excess of 3000 pounds, but not exceeding 3500 pounds in weight, Nineteen and 25/100 Dollars ($19.25); (d) For each automobile weighing over 3500 pounds, but not exceeding 4000 pounds in weight, Twenty-six and 25/100 Dollars ($26.25); (e) For each automobile weighing in excess of 4000 pounds Thirty Dollars ($30.00)."

I refer you to an opinion of this office found in **Quarterly Reports of Attorney General, Vol. I, page 293**, relative to the above Section of the Revenue Act.

In the case of **Jarell v. Orlando Transit Co.**, 167 So. 664, the Supreme Court of Florida in 1936, said:

"The term taxicab is used to describe a conveyance similar to a hackney carriage or the old-fashioned hack or stage, which is held for hire at designated places and has no regular schedule or route, but operates to carry passengers at any time to any point and subject to call. Huddy Automobile Laws, 1-2, Sec. 117, p. 301."

In **Frick v. City of Gary**, 135 N. S., 346, the Supreme Court of Indiana, said:

"The word 'taxicab' has a well-known and definite meaning. Vehicles which operate from a fixed station at which the drivers receive passengers or receive telephone calls directing them where the passengers will be found, and which drive to the destination of their passengers over any streets which are available for such travel * * *"

If we held that these busses were operated as a part of a taxicab or similar system, the license under subsection (c) of Schedule 158.3 would only authorize the operation of the vehicle in the city or incorporated town or police jurisdiction of the licensee and would not permit the operation of the busses generally in the county. It would still be necessary for the owners of the busses to qualify as common carriers for the general operation of the busses in the county as outlined in your letter. **Quarterly Report of Attorney General, Vol. III, page 30.**

I refer you to an opinion of this office found in Biennial Report of Attorney General 1934-36 at page 258, which holds that busses owned by individuals and generally used in the transportation of school children to and from schools, are not exempt from payment of license tax if other trips are made and fares or charges are collected for such trips, and should be licensed as busses and not jitney busses.

This opinion was construing the 1927 Act, which provided in part as follows:

"* * * each automobile, motor car, or motor bus, used for transporting passengers paying fare or charges except a jitney bus."

The premises considered, it is my opinion that the privately owned school busses, operated in a county for other purposes than transporting school children, should be licensed as motor busses under subsection (a) of Schedule

158.3 of the 1935 Revenue Act, as amended by Act No. 530, H. 921, approved September 14, 1935, (General Acts 1935, page 1118).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 23, 1939.

Hon. Cyrus B. Brown, President,
Board of Revenue, Montgomery County,
Montgomery, Alabama.

Counties—Claims—

County governing body has no authority to compromise, settle or adjust claims for solicitor's fees in forfeiture cases which were not collected originally.

Opinion by Assistant Attorney General Russell:

Dear Sir:

I have your letter of June 5, 1939, in which you request my opinion as follows:

"About three years ago forfeitures were made final against Eugene Heilpern and wife in four criminal cases amounting to $1150.00. These forfeitures were promptly paid together with the costs as taxed by the Clerk of the Circuit Court. In taxing the bills the Clerk failed to tax a Solicitor's fee in each of these cases as required by Section 3738 of the Code of Alabama. It has never been the custom for the past thirty years to tax a Solicitor's fee in a forfeiture bond case in Montgomery County. The Clerk, therefore, failed to collect from Mr. Heilpern Solicitor's' fees in these cases amounting to $57.50.

"Please advise if, under the facts as stated above, the Board of Revenue of Montgomery County, Alabama, would have the authority to compromise, settle and adjust the above claim."

I am of the opinion that your inquiry should be answered in the negative.

Your inquiry involves a construction of Section 6755 (11), Code of 1923, as amended by Acts 1933, page 201, which is as follows:

"Section 6755. AUTHORITY OF COURT.—The court has authority * * * 11. To compromise on such terms as they may deem just, all doubtful claims in favor of counties when such claims arise on account of moneys, heretofore paid in good faith, by order of such courts, or in any case where they deem it to the best interest of the county. * * *"

In an opinion of this office rendered to the State Comptroller on November 4, 1936 (Biennial Report of Attorney General 1936-38, page 45), this section, as amended, was construed. Said opinion held that the court of county commissioners had no authority to compromise a claim against an officer thereof unless the same be of "doubtful validity," (See also opinion of Attorney General to Judge of Probate of Jackson County on April 22, 1939.

In an opinion of this office rendered to Clerk of the Circuit Court of Russell County on April 21, 1937 (Biennial Report of Attorney General 1936-38, page 187) it was held that the five percent solicitor's fee under Section 3738, Code of 1923, on forfeitures should be taxed as costs and added to the amount of the judgment forfeiture .

In the instant case it appears that solicitor's fees in the forfeiture cases amounting to $57.50 should have been collected but were not. This is a definite claim fixed by law and is not one of "doubtful validity." Since it is not one of "doubtful validity," the county governing body would have no authority to compromise, settle or adjust said claim. **Biennial Report of Attorney General, 1936-38,** page 45, supra. **Opinion of Attorney General to Judge of Probate of Jackson County on April 22, 1939,** supra.

The fact that it had been the custom for a number of years not to collect solicitor's fees in forfeiture cases is immaterial.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 23, 1939.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Boards of Equalization—Appropriations—

Act No. 143, S. 14, approved March 15, 1939, creating the offices and fixing the salaries of members of the various county boards of equalization carries with it an appropriation for the payment of the State's portion of said salaries out of the general fund of the State.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 7, 1939, in which you request my opinion as follows:

"The Regular Session of the 1939 Legislature, Act No. 143, Senate No. 14, creates in each county in the State of Alabama a County Board of Equalization, to consist of three members.

"Section 9 of this Act sets up the rate of pay and time of service for these Board Members, the rate of pay of the members being definite, with the exception of the Equalization Board members in counties in which the total assessed value of all taxable property does not exceed ten million dollars according to the Tax Assessor's Abstract of Assessments for the year 1938, which Board members shall be paid at the rate of $5.00 per day for the actual time served, but in no case shall the amount paid for such service exceed $400 per annum for each member of said Board.

"Section 10 of this Act provides for the payment of the Board members, one-third to be paid by the State, one-third to be paid by the county, and one-third to be paid by any municipality in the county in which the total assessed value of all taxable property is equal to or greater than fifty percent of the total assessed value of all taxable property located in the county. In those counties where there is no city in which the total assessed value of the taxable property is equal to or greater than fifty percent of the taxable property of the county, then the compensation of the members of the County Board of Equalization shall be paid one-half by the State and one-half by the county.

"This Act does not make an appropriation to take care of the State's part of payment to members of County Boards of Equalization, and we would like to have your opinion with reference to the payment of the State's part of these salaries, in view of the fact no appropriation was made by the Legislature for this specific purpose. What fund shall be charged with these expenditures?

"Your early reply will be appreciated very much as we have on hand now several expense vouchers from Board members for May 1939 salaries."

In answer to your inquiry, it is my opinion that Act No. 143, S. 14, approved March 15, 1939, carries with it an appropriation for the payment of the State's part of the salaries or compensation of the members of the various county boards of equalization and you would be authorized to pay same.

An act creating an office and fixing a definite salary by law carries an appropriation to pay the salary from time to time. **Opinion of the Justices,** 186 So. 731; **Riggs v. Brewer,** 67 Ala. 282

Section 9 of the act in question definitely fixes the salaries of members of the various county boards of equalization in stated amounts (so much per annum, varying according to the assessed valuation in different counties) with the exception of those counties whose assessed valuation does not exceed $10,000,000 according to the tax assessor's abstract of assessments for 1938. In such counties, the rate of pay is $5.00 per day per member for the actual time served, with a maximum limitation of $400.00 per annum. Although the total amount a member in such counties might receive may not be accurately ascertained at the present time, yet, in my opinion, the rate of pay is sufficiently definite to carry with it an appropriation. There existed no necessity for the legislature to make an appropriation other than was made in the section fixing the salary. **Quarterly Report of Attorney General,** Vol. XIV, p. 134. **State ex rel State Tax Commission v. Smith,** 188 Ala. 432, 66 So. 61. See also **Nichols v. Comptroller,** 4 Stewart & Porter, 154; **Reynolds v. Taylor, 43** Ala. 418; **Riggs v. Brewer,** supra; **State v. Henderson,** 199 Ala. 244; 74 So. 344; **In re Opinions of the Justices,** 234 Ala. 555, 176 So. 367.

As to the question in regard to the fund or funds from which the said salaries are payable, I advise that same are payable from the general fund. **Quarterly Report of Attorney General, Vol. XIV;** p. 134, supra. **State ex rel State Tax Commission v. Smith,** supra; Cf. **Weaver v. Tidwell,** 228 Ala. 169, 153 So. 218.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 28, 1939.

Hon. T. Weller Smith, Chief,
Alabama Highway Patrol,
Montgomery, Alabama.

State Highway Patrol.—Act No. 181 (General Acts 1939) approved March 18, 1939 and effective September 30, 1939—

1. Under said act, witnesses subpoenaed by Director of Public Safety or his authorized agent to attend hearing on the suspension of a driver's license, may not be paid.

2. Under said act, the Director of Public Safety does not have authority to assess the cost of such hearing against the licensee.

3. Under said act, the cost of such hearing which is incurred by the State Highway Patrol are expenses incurred under the provisions of said act, and may be paid out of the Highway Patrol Fund.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 28, 1939, in which you request my opinion as follows:

"Re: House Bill, 245, Session 1939.

"Please advise me on the following question:

"Under Section 10, paragraph (j) above House Bill, upon the suspension of the license of any person by the Director of Public Safety such licensee may request and the Director must afford him an opportunity for a hearing within thirty days within the residence of the County of said licensee. This section provides that the Director or his authorized agent may issue subpoenas for attendance of witnesses, etc.

"Is there any provision of the law whereby witnesses in such cases may be paid? Has the Director the authority to assess cost against licensee in such cases and if not has the Director of Public Safety the authority to pay said cost?"

The act to which you refer in your letter of inquiry is Act No. 181 (General Acts, 1939) approved March 19, 1939, and effective September 30, 1939. The pertinent provisions of said act are contained in Subsection (j) of Section 10 thereof, which reads as follows:

> "Upon suspending the license of any person as hereinbefore in this section authorized, the Director of Public Safety shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not more than thirty (30) days after receipt of such request in the county wherein the licensee resides unless the Director of Public Safety and the licensee agree that such hearing may be held in some other county. Such hearing shall be before the Director of Public Safety or his duly authorized agent, and upon such hearing the Director of Public Safety or his duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a re-examination of the licensee. Upon such hearing the Director of Public Safety or his duly authorized agent shall either rescind his order of suspension or, good cause appearing therefor, may extend the suspension of such licensee or revoke such license. If the hearing is conducted by a duly authorized agent instead of by the Director of Public Safety himself, the action of such agent must be approved by the Director of Public Safety."

You will note that no provision is made in said section for the payment of persons who are subpoenaed to attend such hearings as witnesses. I have carefully examined the entire act and do not find any such provision contained therein. Consequently, persons subpoenaed to attend such hearings as witnesses may not be paid since there is no statutory authority providing therefor. The general rule on this subject is stated in 70 C. J. 67 as follows:

> "Witnesses are entitled to compensation only under statutes providing therefor. They are not entitled thereto at common law, or in cases for which the statute does not provide. Statutes relating to calling of witnesses and making no provision for their compensation do not entitle them thereto."

I presume that the cost to which you refer is the cost incurred by the Director of Public Safety or his subordinate officers or employees in conducting such hearings. The above-quoted provision of said act contains no provision for the taxation of such cost against the license, and no such provision is contained elsewhere in said act. Therefore, I am of the opinion that such costs may not be taxed against such licensee since there is no statutory authority therefor. In an opinion to Hon. B. P. Singleton, Chief Examiner of Accounts, Capitol, under date of May 11, 1939, a copy of which is herewith enclosed for your information, this office spoke as follows:

> "In the case of **Ex parte Hill**, 122 Ala. 114, 26 So. 230, the court said:
>
> " 'The sole authority for sentencing a convict to hard labor on account of costs is found in the statutes.'
>
> "We think that it is likewise true that the power to impose the payment of costs on the defendant in any case rests entirely with the statutes."

I am of the opinion that such cost, that is, cost incurred by the Director of Public Safety or his subordinate officers or employees in conducting such hearing, are expenses incurred under the provisions of the said act, and that the same may be paid from the Highway Patrol Fund. Authority for the payment of the cost so incurred out of the Highway Patrol Fund is contained in Section 13 of said Act from which we quote in pertinent part:

"The necessary expenses and the costs of necessary equipment, when approved by the Governor and the Director of Public Safety, are likewise to be paid by warrants drawn by the Comptroller on the Highway Patrol Fund in the State Treasury. There is hereby appropriated out of said Highway Patrol Fund in the State Treasury any or all moneys in said fund that may be necessary to pay the salaries and/or expenses provided for or incurred under the provisions of this Act."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 28, 1939.

Hon. T. Weller Smith, Chief,
Alabama Highway Patrol,
Montgomery, Alabama.

State Highway Patrol—Courts—

Municipal Court of Bessemer, created by Act No. 140 (Local Acts 1927, p. 54) approved July 7, 1927, has jurisdiction of all misdemeanor cases, except for violations of the prohibition laws, made by the Highway Patrol, in the same territorial jurisdiction as that of the circuit court of the Tenth Judicial Circuit, holding at Bessemer; which said territorial jurisdiction is fixed by Act No. 362 (Local Acts 1935, p. 216) approved September 7, 1935, whether said cases are made within the police jurisdiction of the City of Bessemer or not.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 30, 1939, in which you request my opinion as follows:

"Attached herewith please find letter from Mr. Lee Bains, Secretary, Bessemer Bar Association regarding the placing of Highway Patrol cases in the Bessemer Municipal Court.

"It is respectfully requested that a ruling be given whether a Municipal Court has jurisdiction in cases made by the Highway Patrol outside of the police jurisdiction.

"I believe that Mr. Bains' letter is self-explanatory. If there is any further information desired, please call upon me."

From your letter, you seem to be of the opinion that the Municipal Court of Bessemer referred to in the letter which you enclosed from the Secretary of The Bessemer Bar Association is a regular Municipal or Recorder's Court. If it was, its jurisdiction in cases made by the Highway Patrol would be limited to misdemeanor cases committed within the City of Bessemer or the police jurisdiction thereof. See Section 1945 of the Code of Alabama, 1923.

However, the Municipal Court of Bessemer referred to in the letter from the Secretary of The Bessemer Bar Association is not such a court. Instead, it is an inferior court created by Act No. 140 (Local Acts, 1927, p. 54), approved July 7, 1927. This court was the successor to a previous inferior court created by Act No. 275 (Local Acts, 1915, p. 134) approved August 27, 1935, as amended by Act No. 262 (Local Acts 1919, p. 93) approved September 2, 1919, as superseded by Act No. 119 (Local Acts 1923, p. 43) approved August 2, 1923.

The sections of the 1927 Act which created this court and gave it the name of the "Municipal Court of Bessemer", that appertain to the criminal jurisdiction of the court are Sections 1, 20 and 35, which read respectively as follows:

"Section 1. That there is hereby established an Inferior Court in Precincts 2 and 33 in Jefferson County, Alabama; said precincts lying within or partly within the City of Bessemer, Alabama, which shall be known and designated as the Municipal Court of Bessemer, which shall be in lieu of all justices of the peace within said precincts, and in lieu of all inferior courts heretofore created in lieu of justices of the peace in said precincts. Said court shall be held in a place furnished and designated by the Board of Revenue of Jefferson County as the place for holding same. The said court shall have all the powers and jurisdiction now conferred or that may hereafter be conferred by law on justices of the peace, and the judge of said court shall have and exercise all the power and authority, perform all the duties now prescribed, or that may hereafter be prescribed by law for justices of the peace, and shall have all the power and authority over the matters transacted in said court."

"Section 20. That this court shall have exclusive and final jurisdiction concurrently with the Circuit Courts of this county in all misdemeanor cases, except for violations of the prohibition laws, arising in Jefferson County."

"Section 35. That the provisions of this act shall not take away any jurisdiction or power from any Inferior Civil Court or Inferior Criminal Court established in a place other than in the City of Bessemer, Alabama, or that may be hereafter established in a place other than in the City of Bessemer, Alabama, neither shall the provisions of this act take away any jurisdiction or power from the Domestic Relations Courts or Juvenile Courts of this County. Provided further, that in no event shall the territorial jurisdiction of the court hereby created extend over or be construed to include territory beyond that that is or may hereafter be included in the territorial jurisdiction of the Circuit Court of Jefferson County, Alabama, sitting at Bessemer, in said county."

From a reading of Section 20 alone, it would seem that said court would have jurisdiction of all misdemeanor cases, except for violations of the prohibition laws, arising anywhere in Jefferson County. However, you will note that Section 35 provides that the territorial jurisdiction of the court shall, in no event, "extend over or be construed to include territory beyond that that is or may hereafter be included in the territorial jurisdiction of the Circuit Court of Jefferson County, Alabama, sitting at Bessemer, in said county."

Construing these sections together, it is my opinion that said court has criminal jurisdiction in all misdemeanor cases, except for violations of the prohibition laws, arising within the territorial jurisdiction of the Circuit Court of the Tenth Judicial Circuit, holding at Bessemer.

The territorial jurisdiction of the Circuit Court of the Tenth Judicial Circuit, holding at Bessemer, is fixed at present by Act No. 362 (Local Acts 1935, p. 216) approved September 7, 1935, from which we quote in pertinent part:

> "The said Circuit Court of the Tenth Judicial Circuit holding at Bessemer, as in this Act provided, shall have, exercise and possess, all of the jurisdiction and the powers which are now or which may hereafter be conferred by law on the several circuit courts of this state, which said jurisdiction and powers shall be exclusive in, limited to, and extend over that portion of the territory of the County of Jefferson, which is described as follows, to-wit: Begin at the point where the Range line dividing Ranges 2 and 3, going South first intersects the Cahaba River, in Township 19, on the County line, between the Counties of Jefferson and Shelby, and run thence North along said Range line to the Northeast corner of Section 13, Township 19, Range 3 West; thence West along the Section line one mile to the Northwest corner of said Section 13; thence North one mile to the Northeast Corner of Section 11, Township 19, Range 3 West, thence West 3 miles to the Southeast corner of Section five, Township 19, Range 3 West; thence North three miles to the Northeast corner of Section 29, Township 18, Range 3 West; thence two miles to the Southeast corner of Section 24, Township 18, Range 4 West; thence North two miles to the Southeast corner of Section 12, Township 18, Range 4 West; thence West one-fourth of a mile to the East boundary line of the City of Fairfield as it now exists; thence in the general direction of North with and along the East Boundary line of the said City of Fairfield, and turning with and continuing along said boundary line of said City around the North end of said City, and in a general Southwest direction, continuing along said boundary line of said City of Fairfield to the point where said boundary line intersects the line that bounds Sections 11 and 12 in Township 18, Range 4 West, on the North, thence West to the Northwest corner of said Section 11, Township 18, Range 4 West, thence North 4 miles to the Northeast corner of Section 22, Township 17, Range 4 West; thence West two miles to the Southeast corner of Section 17, Township 17, Range 4 West; thence North one mile to the Northeast Corner of Section 17, Township 17, Range 4 West; thence due West to the Intersection of the County line between the counties of Walker and Jefferson; thence with and along said County line and turning with and continuing along the same as it divides the Counties of Walker and Jefferson to its intersection with the County line of Tuscaloosa County; thence with the variation of and along the County line of Tuscaloosa County in a general Southeasterly direction to the point where the said County line intersects the County line of Bibb County; thence in a general Easterly and North Easterly direction with and along said Bibb County line as it divides said County of Bibb from the County of Jefferson to the point where said County line intersects the County

line of Shelby County; thence in a general Northeasterly direction with and along said Shelby County line as it divides the said Counties of Shelby and Jefferson to the point of beginning, and from and over the above mentioned and described territory all jurisdiction and powers heretofore or now exercised or existing therein by the Circuit Court of the Tenth Judicial Circuit as now held at Birmingham, is hereby expressly excluded."

The premises considered, it is my opinion that the Municipal Court of Bessemer has jurisdiction of all misdemeanor cases, except for violations of the prohibtion laws, made by the Highway Patrol arising anywhere within the territorial jurisdiction of the Circuit Court of the Tenth Judicial Circuit, holding at Bessemer (which is set out in the excerpt from the 1935 Local Act, supra), whether said cases arise inside or outside of the police jurisdiction of the City of Bessemer.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 28, 1939.

Hon. Jas. B. Little,
Superintendent of Banks,
Montgomery, Alabama.

Banks and Banking—Trust Companies—

A State Bank must comply with the provisions of Section 6388 of the Code of 1923, before it can carry on a trust business.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of April 15, 1939, is as follows:

"The attorneys for a State Bank, examined by this Department, have asked to be advised whether or not the bank is permitted to serve 'gratuitously as trustee under a deed of trust to secure a small bond issue'. The bank in question has a total capitalization of $47,000.00.

"Section 6365 of the 1923 Code of Alabama authorizes corporations formed for the purpose of carrying on the business of banking and trust companies doing banking business to serve as trustees for any purpose, to do any business and exercise any powers incident to the business of trust and banking. Section 6388 provides that corporations organized and operating as trust companies shall have the word 'trust' as a part of their corporate name unless organized to do a banking business and having a capital stock of $50,000.00 or more, in which event such companies shall have the right to become trustees for any purpose.

"Inasmuch as Section 6388 involves a matter of regulation, there is a question in our minds as to whether such section limits the right of the subject bank to serve as trustee in the manner hereinabove referred to."

In order to determine whether or not a State Bank is permitted to carry on a Trust Business, it is necessary to read Sections 6365 and 6388 of the Code of 1923 together.

Section 6365 confers upon corporations carrying on a banking business and trust companies doing a banking business certain powers, among which, is a right to become trustees for any purpose. It will be noted from a reading of this section that there is no limitation whatsoever, as to capital stock, or the corporate name of the corporation or company engaging in such business.

Section 6388 provides that every corporation organized as a trust company shall have the word "trust" as a part of its corporate name, unless such corporation has a capital stock of $50,000 or more. Such a corporation having a capital stock of $50,000 or more is permitted to do a trust business, without the word "trust" being a part of its corporate name, upon its board of directors passing a proper resolution and obtaining the written approval of the Superintendent of Banks.

I am of the opinion that Section 6388 is a limitation on Section 6365. It therefore follows that before a State Bank can carry on a trust business it must comply with the provisions of Section 6388. In other words, any such corporation, whether its primary purpose be banking or not, if its capital stock be less than $50,000 must have the word "trust" as a part of its corporate name, and if its capital stock be more than $50,000 must either have the word "trust" as a part of its corporate name or have its directors pass a proper resolution and obtain the written approval of the Superintendent of Banks, as provided by Section 6388, before such corporation can engage in a trust business.

It is therefore my opinion that unless the Bank mentioned in your request has complied with the provisions of Section 6388, it may not serve as trustee in the manner referred to. The fact that you state that the Bank in question desires to act gratuitously as trustee, would not in any way affect this opinion, as it would nevertheless be acting as trustee whether any compensation was paid or not.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 28, 1939.

Hon. E. W. Vance, Member,
Barbour County Board of Revenue,
Eufaula, Alabama.

Counties—Paupers—

Burial expenses must be borne by county in which death occurs.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of June 2, 1939, in which you request my opinion as follows:

"I write you as a member of the Board of Revenue of Barbour County for advice on the following matter.

"Charlie Smith, colored, age 76, was a Department of Public Welfare client and was a life long resident of Barbour County until he moved to Dale County in December, 1938. He died in Dale County February 28th., 1939, and about sixty days after he moved into Dale County. The burial expenses were borne by the Dale County Department of Public Welfare, and the cost of the casket amounted to $10.00. The Public Welfare Department of Dale County are calling on the Public Welfare Department of Barbour County to refund the cost for this casket. The application for this cost is accompanied by a certified account for $10.00 paid to the Holman Funeral Home on March 23rd, 1939. The Dale County Agency is taking the position that the Department of Public Welfare of Barbour County is responsible. Our Board of Revenue would be pleased to be advised as to whether or not they have the authority to pay this $10.00."

It is my opinion that the burial expenses of the pauper in question must be borne by the county in which the pauper dies, and so in this case should be borne by Dale County. Section 2801 of the Alabama Code of 1923 provides as follows:

"Section 2801. Burial of the poor.—Upon the decease of any persons having no estate, leaving no relative in the county with ability or estate adequate to defray his necessary burial expenses, such expenses are a charge upon the county in which such death shall take place."

It will be noted that the section makes the expenses a charge upon the county in which the death takes place. Furthermore, Section 2790 of the Alabama Code of 1923 provides as follows:

"Section 2790. Relief of those not entitled to a settlement; burial of strangers.—The court of county commissioners shall also relieve, support, or employ paupers found or being in the county, though not entitled to a settlement therein, and in case of their decease, shall decently bury them, and the court shall decently bury all strangers dying in the county."

Construing these statutes together, and in view of an opinion of the Attorney General, reported in Biennial Report of Attorney General 1926-28, page 167, and an opinion of the Attorney General reported in Biennial Report of Attorney General 1928-30, page 506, I am of the opinion that such burial expenses must be borne by the county in which the pauper dies.

There being no provision in the act creating the Public Welfare Department, nor in subsequent acts concerning same, for the burial of paupers, this expense is still borne by the counties, in accordance with the above-quoted Code sections.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 28, 1939.

Hon. F. B. Pratt,
Superintendent of Education,
Bibb County,
Centreville, Alabama.

County Board of Education—

Members allowed actual expenses in attending meeting.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of May 31, 1939, which is as follows:

> "I find that in this county the members of the Board of Education have been paid 5c per mile when attending meetings of the Board. Also, I note that in the 1927 School Code—Section 92 of Article 6, it states that Board Members are to be paid actual expenses—that is hotel bill and transportation for 12 meetings during the year. Please give me a ruling as to whether we may still pay the members of the Board 5c per mile or not. As you know—bus fare is much less than this and we have three members who can ride the bus to our meetings."

I am of the opinion that the members of the County Board of Education shall be paid their actual traveling and hotel expenses. Section 92 of the School Code of 1927 provides as follows:

> "92. Compensation of County Board.—The members of the County Board of Education shall receive from the public school funds of the County five dollars a day and their actual traveling and hotel expenses incurred in attending meetings of the Board, and transacting the business of the Board. The members of the County Board shall not be allowed pay for more than twelve days in any one year, and their expenses shall

be paid in like manner as provided for the compensation of teachers. They shall not be required to hold teachers' certificates."

The language of this statute is clear and unambiguous, and should be literally followed. **State vs. Praetorians,** 146 So. 411, 226 Ala. 359.

However, it will be noted that the statute does not specify any mode of transportation. Therefore, if a member chooses to attend the meeting in his automobile, he would be entitled to mileage thereon in an amount reasonably necessary to compensate him for the use of his car, but if he attends by bus or train he should receive only the actual cost of such transportation.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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June 28, 1939.

Hon. Robt. L. Harrison,
Tax Collector, Butler County,
Greenville, Alabama.

Tax Sales:—Clerk in office of Tax Collector may bid in property sold at tax sale where Tax Collector not directly or indirectly interested.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of May 24, 1939, in which you request my opinion as follows:

"Would it be legal for just a clerk in Tax Collector's office to bid in property sold by Tax Collector at tax sale?"

I am unable to find any legislative expression concerning your inquiry other than Section 236 of the Revenue Code of 1935, which is as follows:

"Section 236. If the assessor, collector, judge of probate or any county tax assessor shall directly or indirectly, be concerned or interested in the purchase of any real estate sold for taxes, the sale shall be void, and he and his sureties on his official bond shall be liable to a penalty of not exceeding five hundred dollars ($500.00) to be fixed by the jury, which may be recovered in an action in the circuit court, or court of like jurisdiction brought on the relation of any taxpayer of the county, in the name of the State, one-half of the amount recovered to be paid to the realtor, and the other half to the State."

It is apparent that this statute is a a penal statute, and it is a well established principle of law that penal statutes must be strictly construed. **Knowles vs. State,** 19 Ala. App. 476, 98 So. 207; **Jacobs vs. State,** 47 Ala. App. 396, 85 So. 837. And that penal statutes are not to be extended by construction, but must be limited to cases clearly within the language used. **Greek-American Produce Co. vs. Illinois Central Railway Co.,** 4 Ala. App. 377, 58 So. 994.

This statute applies only to the officers named therein and has no application to a clerk in the Tax Collector's office.

Therefore, It is my opinion that a clerk in the Tax Collector's office may bid in property sold at tax sale, provided the Tax Collector is not directly or indirectly concerned or interested in such purchase.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 28, 1939.

Hon. J. W. Rutland,
Tax Assessor,
Colbert County,
Tuscumbia, Alabama.

Taxation—

Property that has been sold for state and county taxes and purchased by the state at tax sale is not subject to city taxes during the time the title to such property is in the state.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 4, 1939, in which you request my opinion as follows:

"By city ordinance we are responsible for the assessing and collecting city tax for Tuscumbia, beginning with tax year 1937.

"In 1938 Mrs. Marjorie Throckmorton purchased from the State a lot on which is located a dwelling, the State included tax up to and including 1939, for State and County.

"I made up an assessment on this property charging City tax for 1937 and 1938.

"Mr. F. E. Throckmorton Atty. informs me that he will have the sale set aside if the tax collector advertises and sells the property for the nonpayment of city tax.

"Mr. Throckmorton claims that there should be no charge for 1937 since the property was in the State of Alabama in 1937.

"I claim the city has a lien on the property and it was my duty to set up the charge.

"An early opinion will be appreciated both by the writer and Mr. Sherrill the tax collector since the time for advertising delinquent tax."

In my opinion, the property described in your letter of inquiry is not subject to city taxes for the year 1937 for the reason that it was at that time the property of the State of Alabama.

This office in an opinion rendered to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, under date of November 22, 1935, (Quarterly Report of Attorney General, Vol. I, p. 207) held that when property at the tax sale by the state that the title to such property passed to the state.

Section 91 of the Constitution of 1901 provides in pertinent part:

"The Legislature shall not tax the property, real or personal, of the State, counties, or other municipal corporations * * *."

By Subsection (a) of Section 2 of the 1935 Revenue Act, all property of the State of Alabama is exempted from ad valorem taxation.

Section 89 of the Constitution of 1901 provides:

"The legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state."

In **Baldwin v. City Council,** 53 Ala. 437, the Court made the following observation:

"In the absence of such constitutional restriction, it is certainly true the legislature may convey on the municipalities it creates, such measure of power to levy and collect taxes as it may deem expedient, **not greater or other than it possesses.**" (Emphasis ours).

In **Mills v. Court of Commissioners, Conecuh County,** 204 Ala. 40, 85 So. 564, the Court speaking through Mr. Justice Gardner, said:

"Cities, incorporated towns, and counties have such power of taxation, as is delegated to them by legislative authority (Phoenix Carpet Co. v. State, 118 Ala. 143, 22 South, 627, 72 Am. St. Rep. 143); and the legislative power to regulate the subject of taxation is unlimited, except so far as that department may be restrained by the state or federal Constitution (Hare v. Kennerly, 83 Ala. 608, 3 South, 683; Capital City Water Co. v. Board of Revenue, 117 Ala. 303, 23 South. 970)."

See also **City of Russellville v. Citizens Bank & Savings Co.**, 207 Ala. 348, 92 So. 469; **Conecuh County v. Simmons**, 19 Ala. App. 65, 95 So. 48, Cert. Den. 209 Ala. 96, 95 So. 499, and **Beeland Wholesale Co. v. Kaufman**, 234 Ala. 249, 174 So. 516.

Since there is a constitutional prohibition against the Legislature taxing the property of the State (Section 91, supra) and since, as shown by the authorities above cited and quoted from, municipal corporations have only such power to tax as is granted to them by the Legislature, and the Legislature cannot grant to them a power to tax greater or other than it possesses, and may not authorize any municipal corporation to pass laws inconsistent with the general laws of the State (Section 89, supra) any attempt on the part of the city to subject the property of the State of Alabama to taxation would be abortive.

The premises considered, since the property in question belonged to the State in 1937, it is my opinion that the said property was not subject to city taxes in that year.

Cf. Opinion to Hon. H. E. Kendrick, Tax Collector, Dallas County, Selma, Alabama, under date of May 15, 1936 (Quarterly Report of Attorney General, Vol. III, p. 134) wherein we held that property sold to the city at tax sale prior to the assessment date for state and county taxes is not subject to assessment for state and county taxes during the years it is owned by the city.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 28, 1939.

Hon. Homer F. Mitchell,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Poll Tax—Poll tax paid for 1936, 1937 and 1938, although no poll tax for those years was due, cannot be applied to the years 1932, 1933 and 1934, last years for which poll tax was due but for which no poll tax was paid.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 1, 1939, in which you request my opinion as follows:

"Please give us your opinion on the following matter:

"During the month of January, 1939, Mr. Ernest Hankey came to this office and inquired about the status of his poll tax. On investigation we found that he was due back poll tax for the years 1932, 1933 and 1934 and that he became 45 years of age in 1935 and was not due poll tax for that year. We told him the amount and years that he was due poll tax and he went to the Tax Collector's office to pay it. The Tax Collector wrote him a receipt for $4.50 which was the correct amount due, but on the receipt he gave him credit for the past three years which were 1936, 1937 and 1938. Evidently, Mr. Hankey did not tell him what years he wanted to pay for and the Tax Collector took it for granted that he wanted to pay for the past three years. The question is: Can the Tax Collector legally change his records so as to give him credit for the years he was actually due for instead of for the past three years?

In my opinion, the poll tax paid by the taxpayer in question for the years 1936, 1937 and 1938, cannot be credited to the years 1932, 1933 and 1934, even though no poll tax was due for the years paid, and poll tax was due and has not been paid for the other years, and even though it may have been the intention of the taxpayer to pay poll tax for the years for which it was due and unpaid, and not for the years to which the tax was credited.

An opinion peculiarly applicable to the instant situation was rendered by this office to Hon. A. M. McConnell, Judge of Probate, Limestone County, Athens, Alabama, under date of July 18, 1936, Biennial Report of Attorney General, 1934-36, page 734. We quote in extenso from that opinion:

"As I understand the facts detailed in your letter the lady in question paid her poll taxes for the years 1920-1927 inclusive, as they became due, but failed to pay her poll tax for 1928, the last year she was due to pay and then at a later time paid poll tax for the year 1929, even though she was not due any poll tax for that year. I presume that she was not due poll tax subsequent to the year 1928 because of the fact that she was over 45 years of age after that time.

"It is my opinion that the said poll tax paid for the year 1929 cannot be credited to the year 1928. This office in opinions to Hon. T. L. Head, Treasurer, Board of Education, Montgomery County, Montgomery, Alabama, under date of February 19, 1935, Office Edition 2-A, page 168 and to Hon. Chas. E. McCall, State Auditor, Capitol, under date of April 18, 1935, Office Edition 3-A, page 210 held that poll tax, voluntarily, though erroneously paid, could not be refunded. I enclose copies of these opinions for your information.

"It is my opinion that there is no more authority for crediting a poll tax erroneously paid for one year for which no poll tax was due to a former year for which poll tax was due but not paid than there is for refunding poll tax erroneously paid.

"The Supreme Court of Alabama in the case of Shepherd v. Sartain, 185 Ala. 439, at page 458, said:

" 'Where the records show the payment by a voter of poll taxes for a series of years, with a single omission, and show also the payment of two such taxes for a single year, thereby showing that he has paid the

number of taxes to which he was subject, it will be presumed, nothing appearing to the contrary, that the duplicated payments was intended for the omitted year and it will be treated as so paid.'

"The reason for such a holding is obvious. In that case the record clearly showed on its face that there was an error on the part of the Tax Collector which should have been and was corrected.

"But such is not the situation in the instant case. I think the error here is clearly one on the part of the taxpayer and not of the Tax Collector and the taxpayer cannot receive any benefit from the erroneous payment.

"Therefore, it is my opinion that said person is not a qualified elector even though she has paid the required number of poll taxes due, since she has not paid poll tax for each year such tax was due.

"It necessarily follows that you are without authority to place such person on this list of qualified electors."

Applying the same rule to the instant case, it follows that the error here was on the part of the taxpayer in not telling the tax collector for what years he desired to pay, and that it was not on the part of the tax collector, and, consequently, such person cannot receive any benefit from the erroneous payment, and the tax collector could not legally change his records so as to give the taxpayer credit for the three years he was actually due poll tax instead of for the three years to which the tax which he paid was credited.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 28, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Garage repair shop license—Blacksmith who operates shop where automobiles are repaired, but who is not equipped with special equipment required for some acts of automobile repairs, held liable for license Schedule 113 of Section 348 of 1935 Revenue Act.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of June 5, 1939, in which you request my opinion as follows:

"We have a party in this county that operates a general blacksmith shop, shoeing horses, sharpening plows and general blacksmith work. This party also repairs automobiles that are brought to him if it is possible for him to do so with the blacksmith equipment and wrenches that he has. He is not equipped to do general auto repairs but such jobs brought

him as can be done without special equipment are done by him. Is this party subject to license under Schedule No. 13 of the 1935 Revenue Acts?"

Your questions requires a construction of Schedule 13 of Section 348 of the Revenue Act of 1935, which Schedule provides as follows:

"For GARAGES or shops where automobiles are repaired, painted, trimmed or welded for the public: Each shop where the work is done by:

| | |
|---|---|
| One man | $ 5.00 |
| Two men | 10.00 |

and an additional license of five dollars ($5.00) for each workman in excess of two so employed. Where garage or shop owners do work in shops they shall be counted as workmen. Provided the maximum number of men employed at any time during the license year shall be the basis of computing the license due."

I wish to call your attention to the particular wording of this statute which states, "For garages or **shops where automobiles are repaired.** * * *" (Emphasis supplied).

You will note that this language is very clear and all inclusive. The general rule is that where the language of a statute is unambiguous, the clearly expressed intent must be given effect, and there is no room for construction.

L. & N. Railroad Co. v. Western Union Telegraph, 158 Ala. 124, 71 So. 118. American Cases 1917 (b) 696.

In my judgment the statute here under consideration offers no room for construction other than to be construed to coincide with the ordinarily accepted meaning of the words used.

White v. City of Decatur, 25 Ala. App. 274, 144 So. 872; Cert. Den. 225 Ala. 646, 144 So. 873, 86 A. L. R. 914.

The premises considered, the plain, unambiguous language of this statute requires a license of all who perform the acts here set out. It is, therefore, my judgment that your question must be answered in the affirmative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 28, 1939.

Hon. Brooks Toler,
State Director,
Division of Forestry,
Montgomery, Alabama.

County may legally appropriate county funds to the Department of Conservation, Division of Forestry, for the purpose of forest fire protection work in the county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated June 16, 1939, which is as follows:

"For many years the State Forestry Commission, acting under authority of paragraph 23, section 6755 of the 1923 Code of Alabama, has requested and received aid from various counties in Alabama toward supplying revenue from their County Treasuries to assist in forest fire protection work in the county appropriating said money.

"One particular county has sent word that it would appropriate money from its treasury for fire protection work but could not do so, legally, under the paragraph and section above referred to.

"I am setting out paragraph 23 of Section 6755 and request your opinion as to the legality of a County allocating money from its treasury to the Department of Conservation, Division of Forestry, for the purposes of fire protection in that particular county, under authority of this paragraph and section.

"Paragraph 23, Section 6755, 1923 Code of Alabama

" 'To set aside, appropriate and use county funds or revenue for the purpose of developing, advertising, and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties.' "

In my opinion, your question should be answered in the affirmative. I call your attention to the fact that subsection 23 of Section 6755 of the 1923 Code of Alabama, supra, as amended by General Acts of Alabama 1931, page 759, specifically authorizes the county to appropriate its funds for the purpose of developing timber in the county. In my opinion, forest fire prevention work is an important part in the development of the timber resources of the county and county funds may be expended therefor. **See opinion of the Attorney General, Office Edition, Vol. 3-A, page 65; Biennial Report of Attorney General 1934-36, pages 201 and 294; Biennial Report of Attorney General 1936-38, page 445.**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 28, 1939.

Hon. Sim L. Howell, Chairman,
Board of Revenue and Control,
Morgan County,
Decatur, Alabama.

Taxation—Boards of Equalization—

Members of county boards of equalization in counties whose assessed valuation is between $15,000,000 and $25,000,000 are paid in accordance with the schedule set out in Section 9 of Act No. 143, S. 14, approved March 15, 1939, for counties within said bracket.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 6, 1939, in which you request my opinion as follows:

"The question has arisen in this County with reference to the amount of money each member of the County Board of Equalization shall receive for this year.

"The assessed value in this County for 1938, according to the Tax Asesssor's Abstract of Assessments, places this County in the figures between $15,000,000 and not to exceed $25,000,000. Therefore, under normal operation of the Act members of the Board of Equalization in this County would draw $600 per annum, payable in monthly installments.

"The members of our Board of Revenue and Control sat as a Board of Review under the old law in the month of March and appraised the valuations assessed by the property owners, for which they were paid at the rate of $5 per day.

"It is our interpretation under Section 10 of the Act that this County would normally pay one-third of such cost, the City of Decatur, having fifty percent of the total taxable property, one-third of such cost and the State of Alabama one-third.

"Section 9 of the Act states 'And such other times as the members of the County Boards of Review have heretofore been required to serve and for such services shall be paid at the rate of $5 per day for the actual time served'. Now our interpretation is that this is applicable to the present Board, as they will be in session in this County only three days, including organization, during this month, and of course, they will be in session a part of July.

"Please advise as to whether or not we are correct in the assumption that the members should be paid on a per diem basis for the actual days served or whether they should be paid on a monthly basis."

In answer to your inquiry, it is my opinion that the members of the county board of equalization in question should be paid on the basis set out in that part of Section 9 of Act No. 143, S. 14, approved March 15, 1939, which provides as follows:

"Sec. 9. The annual term of service and compensation of the members of the several County Boards of Equalization, as created by this act, shall be as follows: * * * In those Counties in which the total assessed value of all taxable property exceeds fifteen million ($15,000,000) but does not exceed twenty-five million dollars ($25,000,000), according to the tax assessor's abstract of assessments for the year 1938, the members of the County Board of Equalization shall serve during the months of March, April, June and July of each year, and such other times as the members of the County Boards of Review shall have heretofore been required to serve and for such services shall be paid at the rate of six hundred dollars ($600) each, per annum, payable in four monthly installments. * * *"

Section 9 of the act under consideration provides for the compensation of the members of the various county boards of equalization. The several counties of the State are placed in brackets according to their assessed valuation for the year 1938 and the members of their respective boards of equalization are paid accordingly.

You state that Morgan County's assessed valuation for 1938 is between $15,000,000 and $25,000,000. Therefore, said county comes within this bracket as set out in Section 9, supra, and the pay of the members of its board of equalization is governed accordingly. This pertinent part of Section 9, supra, is quoted above. That portion of Section 9, "and such other times as the members of the County Boards of Review have heretofore been required to serve and for such services shall be paid at the rate of five ($5.00) dollars per day for the time actually serve," referred to in your inquiry, applies only to those counties in the bracket whose assessed valuation for 1938 does not exceed $10,000,000.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 30, 1939.

Hon. J. R. Copeland,
Judge of Probate,
Blount County,
Oneonta, Alabama.

Sales Tax Moneys—Expenditures thereof—

Proceeds going to the county from Sales Tax may be used for the construction of buildings to be used by Public Health Department, Public Welfare Department and the Agricultural Extension Service in cooperation with these State agencies and/or the Federal Government.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of May 16, 1939, in which you request my opinion as follows:

"I will thank you for your opinion on the following question:

"The Blount County Medical Association is desirous of sponsoring under the Works Progress Administration, the erection of an office building, to be used for the purpose of housing the local Health Unit, the Public Welfare Unit, and the Farm Extension Unit.

"Blount County has to its credit in the Sales Tax Trust Fund approximately $7,000.00. Can the Court of County Commissioners use this money in the erection of the building, in cooperation with the above mentioned departments, under the above named sponsorship and agreement that the property on which the building is erected, together with the improvements thereon, to be the property of Blount County when completed and paid for?"

The specific question raised in your request is "to what uses may Sales Tax money of the county be put?" This inquiry may be divided for clarity into two parts: 1. The legal uses of such money. 2. Necessary precedents to this use.

First, we will determine whether or not the construction of an office building for the housing of the Public Health Department, Public Welfare Department and the Alabama Agricultural Extension Service is within the legal use of the Sales Tax money.

Act No. 18, Regular Session, 1939, approved February 8, 1939, commonly called the Sales Tax Act, in Section XXXV reads in pertinent part as follows:

" * * * Provided that the funds divided and distributed to the several counties of the State, as hereinabove provided for, shall be used exclusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension service in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the commissioners court, board of revenue or other governing bodies of the several counties of the State."

The above quoted portion of the Sales Tax Act of 1939 is verbatim with the pertinment part of Section 21 of the Luxury Tax Act, Act No. 126, Special Session 1936-37. I point this out so that it will be seen that all opinions and cases dealing with Section 21 of the Luxury Tax Act of 1936-37, supra, will be applicable to Section XXXV of the Sales Tax Act of 1939, supra.

From the verbage of the above quoted section it appears that the funds designated therein are to be used exclusively for health service, public welfare, and agricultural extension service. The carrying on of the work of these State agencies is the sole use to which this money may be put. Quarterly Report of Attorney General, Vol. VII, page 71.

Therefore, we are confronted with the question of whether or not an office building to house the agencies set out in the Act is within the purview of "carrying on" the work of these agencies. This office has held that the proceeds here under consideration may be used in cooperation with the Department of Public Welfare and State Board of Health in the following projects: To defray expenses incurred for the burial of paupers, for regis-

tration of births and deaths, maintaining a charity ward in a hospital, maintaining a tuberculosis preventorium and to pay the salary of a nurse used in the rest room of the courthouse. Quarterly Report of Attorney General, Vol. VIII, page 5; Quarterly Report of Attorney General, Vol. VIII, page 105. More apropos is an opinion to Hon. W. H. Lindsey, Quarterly Report of Attorney General, Vol. VIII, page 119, which held that the proceeds of the Sales Tax could be used to pay the rent on rooms used by the county health unit.

These opinions, then, indicate that office rent is within the meaning of the statute in that it is in promulgation of the work of the various State agencies with which we are concerned. Moreover, this office has repeatedly held that office rent is within the purview of statutes similar to the one here under consideration.

Biennial Report of Attorney General, 1932-34, p. 594;

Biennial Report of Attorney General, 1932-34, p. 629;

Quarterly Report of Attorney General, Vol. IX, p. 93.

Premises considered, it is my opinion that the constructing of the building in question is a proper use of Sales Tax notices.

However, we are now faced with the second part of this problem, i. e., what procedure must be followed in using the money in question. It will be noted that the Sales Tax Act says "in cooperation with." All of the various uses to which this money has been put as set out in the citations above have been in cooperation with one or another of the State agencies set out in the Act itself. The words, "in cooperation with," have been construed by the Supreme Court of Alabama in the case of **Tuscaloosa County v. Walker,** 235 Ala. 293, 178 So. 543. The words of Justice Gardner in the above cited case are aptly put and give us a clear conception of the attitude of our Supreme Court in regard to the expenditure of the Sales Tax money. I quote below the pertinent part of Justice Gardner's opinion.

> "Clearly, therefore, when the Legislature, in Section 21, **supra,** speaks of expenditure of these funds in co-operation with the county authority, it was not meant that the latter could exercise its own discretion as to the wisdom of such expenditures, and its own judgment as to what in fact was embraced within the influence of the activities of these various governmental agencies. We think the discretion referred to as resting in the county authority was the ascertainment of the purpose or purposes for which the funds were to be expended.
>
> "Thus the county maintains its own initiative and autonomy in determining the purpose or purposes for which the money is to be expended. **But we think it equally clear that it was the legislative intent that these State agencies were to exercise their judgment as to whether or not the expenditures were within the meaning of the terms 'public health,' 'public welfare,' and 'agricultural extension service.'** " (Emphasis supplied.)

From a reading of the opinion of the Supreme Court, it will be seen that the court of county commissioners, board of revenue or other like governing body of the county may determine the purposes for which the money in

question is to be expended with the limitation that the purpose or purposes must come within the limits set out in the act, and further that the determination of whether or not the purpose is within the cognizance of the Act, be left up to the State agency concerned therewith.

Therefore, it is my opinion that if the project proposed in your county is approved by the appropriate State agency, your court of commissioners may appropriate money received by your county from the Sales Tax to promulgate this project.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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June 30, 1939.

Hon. J. Alex Huey,
Solicitor, 12th Judicial Circuit,
Enterprise, Alabama.

Section 23 of Act No. 240, General Acts of Alabama, 1935, page 637, is sufficient to authorize Commissioner, with approval of the Conservation Board, to pass a regulation prohibiting the sale in the State of Alabama of fish lawfully taken from the waters of another state.

Regulation 22 adopted by the Commissioner, with the approval of the Conservation Board, on July 21, 1938, does not conflict with section 23 of Act No. 240, General Acts of Alabama, 1935, page 637, under facts upon which opinion is predicated.

A violator of regulation 22 adopted by Commissioner, with approval of Conservation Board, is subject to the penalty provided by Section 63 of Act No. 240, General Acts of Alabama, 1935, page 637.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated April 4, 1939, which is as follows:

"For several years one Anderson has been engaged in the business of purchasing fish in Florida and bringing them to Enterprise for sale to the several markets here, which have in turn sold them to consumers. During this particular season of the year and continuing for a period of about two months, it is my understanding that his supply of fish is limited largely to bream which he purchases in Florida from persons engaged in the fresh water fish business, the fish being taken from bodies of water from which under the laws of Florida they can now be taken. Four or more markets in Enterprise have been purchasing and reselling these fish.

"One of the State game wardens purchased some of these fish on last Saturday from a local market but has deferred making a case until I obtain from you an opinion on the questions hereinafter propounded, because of the fact that I have heretofore given Mr. H. C. Stephenson, a Justice of the Peace, an opinion in which I held that Anderson and these several markets were not violating any criminal law of the State of Alabama. Therefore under Section 860 of the 1923 Code of Alabama I respectfully request an opinion from you on the following legal questions:

"1. Is Section 23 of the Act approved August 12, 1935, sufficient to authorize the Commissioner, with the approval of the Conservation Board, to prohibit the sale in this State of bream lawfully taken from the waters of another state and legally transported to this State; that is, did the Legislature intend by Section 23 to vest such authority in the Commissioner and the Conservation Board?

"2. As applied to the case of Anderson and the several markets here and the facts as hereinabove stated, does not rule 22 adopted by the Commissioner on July 21, 1938, conflict with the last clause of Section 23 which reads as follows: "Provided, however, that the Commissioner shall not have the right to make or promulgate any rule or regulation which will hamper industry or which will interfere with the operation of any industrial plant or plants, or industrial operation or operations?'

"3. If the Commissioner had the authority to promulgate rule No. 22 so as to prohibit the sale in this State of fish taken from the waters of another state under the circumstances hereinabove outlined, then is such a rule a law of the State of Alabama relating to fish etc., so as to make a violator thereof subject to the penalty provided by Section 63 of said Act approved August 12, 1935?"

In answer to your first inquiry, we refer you to an opinion of this office to Dr. Walter B. Jones, Commissioner, Game, Fish & Seafoods, Montgomery, Alabama, dated March 29, 1939. In this opinion we were called upon to determine the constitutionality of Section 23 of Act No. 240, General Acts of Alabama, 1935, page 637, and further to pass on the constitutionality of regulation number 22 adopted by the Department of Conservation of Game, Fish and Seafoods under the authority vested in said department by Section 23, supra, which regulation prohibits the sale of game fish in this State, regardless of where taken. Said opinion held section 23, supra, to be constitutional and regulation 22, supra, constitutional and a valid regulation for the department to pass under the authority vested in said department by Section 23, supra.

It will be noted that although the opinion to Dr. Jones, supra, dealt only with the constitutionality of Section 23, supra, and regulation 22, supra, yet the authorities cited therein and the conclusions reached, serve to answer your first inquiry in the affirmative.

The second inquiry propounded by you was not considered in the opinion to Dr. Jones, supra. This inquiry is based on a particular set of facts as set out in your letter and in connection with these facts you raise the question whether regulation 22 adopted by the Department of Game, Fish and Seafoods on July 21, 1938, conflicts with the last clause of section 23 of Act No. 240, General Acts of Alabama, 1935, page 637, which is as follows:

"Provided, however, that the commission shall not have the right to make or promulgate any rule or regulation which will hamper industry or which will interfere with the operation of any industrial plant or plants or industrial operation or operations."

It is our opinion that whether regulation 22, supra, conflicts with section 23, supra, rests solely upon the construction placed upon the word "industry" as it appears in the above-quoted portion of section 23, supra.

If the word "industry" is construed to include a fish market business such as you refer to in your letter, then insofar as such a business is concerned, regulation 22, supra, would conflict with the last clause of section 23, supra, and such a business would not be subject to said regulation.

Webster defines industry as:

"Any department or branch of art, occupation, or business, esp., one which employs much labor and capital and is a distinct branch of trade; as, the sugar industry; the iron industry; the cotton industry; agricultural industries."

The above-quoted dictionary meaning of the word "industry" is very broad. **Southern Pac. Co. v. State Corporation Commission,** 3 P(2d) 518. The question arises whether the legislature intended this word as it is used in section 23, supra, to carry the broad meaning given it by Webster. We think not. In the case of **People ex rel. Fullman v. Kelly,** 225 N. Y. 396, 175 N. E. 108, the court in construing a zoning statute said:

" 'Trade', as here used, has the meaning of mechanical employment **or commercial or business enterprises,** while 'industries' is that branch of trade employing capital and labor."

It will be noted that the above-quoted portion of the case of **People ex rel. Fullman v. Kelly,** supra, classifies a commercial or business enterprise as a "Trade" and makes a distinction between a "Trade" and an "Industry". Under this definition from the highest court in the State of New York, a fish market business, such as here under consideration, would be a "Trade" and not an "Industry".

In a further effort to determine the intent of the Legislature in using the word "industry" as it appears in section 23, supra, we endeavor to follow the rule of interpretation as laid down in Black on Interpretation of Laws (2d Ed.) Sec. 67, p. 194, which is as follows:

"Associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found and the meaning of the terms which are associated with it."

It will be noted that the word "industry" as it appears in section 23, supra, is associated with the words "industrial plant", "plants", "industrial operation" and "operations". Our Supreme Court in the case of **Ex parte Oehmig & Weihl,** 91 Alabama 555, adopts Mr. Worcester in defining industrial as "relating to manufactures.' The word "plant" was defined in **Southern Pac. Co. v. State,** supra, as follows:

"A plant is the 'machinery, tools, apparatus, appliances, etc., necessary to carry on any trade or mechanical business, or any mechanical operation or process.' Southern Bell Tel. & Telegraph Co. v. D'Alemberts, 39 Fla. 25, 37, 21 So. 570, 572; Rooney v. Thomsan (Sup.) 84 N. Y. S. 263; Maxwell v. Wilmington Dental Mfg. Co. (C. C.) 77 F. 938, 941."

From the above definition of the words "industrial" and "plant" we arrive at the conclusion that an industrial plant as used in section 23, supra, means machinery or appliances used in manufacturing. The word "plant" as used is heretofore defined, supra, and although we find no legal definition of the word "operations" the manner in which it is associated with the word "industrial" conveys the meaning of "operations relating to manufactures." Hence, applying the rule of interpretation as laid down by Black on Interpretation of Laws, supra, we find that the words associated with the word "industry" as they appear in section 23, supra, do not include or embrace a business such as here under consideration, but in our opinion have no effect of limiting the meaning of the word "industry" to that distinct branch of trade embracing only manufacturing, and takes from it the broad dictionary meaning given the word by Webster.

In a further effort to arrive at the true meaning of the word "industry," we call attention to the holding of the court in the case of **Southern Pac. Co. v. State Corporation Commission,** supra, where it was held that in "common parlance a plant and an industry connote the same thing." (Citing, Sherman v. United States, 282 U. S. 25, 51 S. Ct. 41, 75 L. Ed. 143; Los Angeles Switching Case, 234 U. S. 294, 34 S. Ct. 814, 58 L. Ed. 1319.)

It is therefore our conclusion after a consideration of the definition of the words "Trade" and "Industry" and the distinction between the two as laid down in **People ex rel Fullman v. Kelly,** supra, together with a consideration of the words associated with the word "industry" as it appears in section 23, supra, and applying thereto the principle of interpretation as laid down by Black, supra, we are of the opinion that the word "industry" as used in section 23, supra, does not include a fish market business as here under consideration.

To hold that it was the intention of the Legislature that the word "industry" as it appears in section 23, supra, was meant to include a business such as herein being considered, would have the effect of defeating the purpose of the Legislature in its effort to protect and preserve the game fish in the waters of this great State. It would open the door for all types of illegal methods to be employed in catching game fish, and those engaged in such illegal practices could shield themselves behind the open door which would permit game fish caught in another state to be sold in Alabama.

I answer your third inquiry in the affirmative. Section 23, of Act No. 240, General Acts of Alabama, 1935, page 637, provides that the rules and regulations passed, proclaimed and promulgated by the Commissioner, upon the approval of the Conservation Board, shall have the force and effect of law. Section 63 of said act, supra, prescribes a penalty for the violation of any provision of the laws of the State of Alabama relating to fish or seafoods. Further, section 27 of the rules and regulations adopted by the Commissioner of Conservation of Game, Fish and Seafoods and approved by the Conservation Board on the 21st day of July, 1938, provides as follows:

"Section 27. A violation of the provisions of these Regulations is hereby prohibited and any person, firm, corporation or association so

violating shall upon conviction be subject to the penalty as provided in Section Sixty-Three (63) of the Act approved August 12, 1935 (No. 240; S. 226—Swift), or as otherwise specifically provided."

It is, therefore, my opinion that a violator of Section 22 of the rules and regulations adopted by the Commissioner of Conservation, with the approval of the Conservation Board, would be subject to the penalty provided by Section 63 of Act No. 240, General Acts of Alabama, 1935, page 637.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

---

June 30, 1939.

Mrs. M. L. Wann,
Tax Collector,
Jackson County,
Scottsboro, Alabama.

Officers—Municipalities—

The offices of City Treasurer, City Clerk, and City Councilman are not offices of profit under the State.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 1, 1939, in which you request my opinion as follows:

"Sometime ago the City of Scottsboro availed itself of the provisions of Section 3095 of the Code and since that time I, as Tax Collector of the County, have collected taxes due the City of Scottsboro. At the time of the adoption of the ordinance taking advantage of the provisions of the above mentioned sections of the Code, the minutes of the City Council indicate that it was adopted by the vote of the five members of the City Council, the Mayor not voting. At the time of the adoption of the ordinance one member of the Council was serving as City Treasurer and one member was serving as Clerk, so under the provisions of previous opinions of the Attorney General set forth in the Biennial Reports 1928-30, pages 12,-165-636, the Clerk and Treasurer vacated their office as members of the Council, leaving only three members legally voting for the adoption of the ordinance, which is one vote short of the required majority. At present the Treasurer of the City of Scottsboro to whom I remit city taxes is likewise a member of the City Council.

"In view of the foregoing, I desire an opinion from you as to whether or not the ordinance appointing me Tax Collector for the city was properly adopted and is now of binding effect. Furthermore, I would like to be advised as to whether or not I am safe in remitting city taxes to the present City Treasurer in view of the fact he is also holding office as a member of the City Council.

"In order to assist you in rendering an opinion, I desire to cite the provisions of the following cases: Clark v. Uniontown, 4 Ala. App. 264, 53 S. 725; State vs. Lane, 181 Ala. 646, 62 So. 31; 43 Corpus Juris, page 691, section 1148.

"In view of the fact that I am now ready to remit a considerable amount of City taxes, I will greatly appreciate an opinion from you at the earliest possible moment."

The opinions of this office and the cases decided by our Supreme Court seem to present conflicting views as to the status of municipal offices in regard to their being offices of profit under the State. From a study of all of the cases and opinions, we must conclude that all municipal offices cannot be classed as State offices, but neither can all municipal offices be excluded from the classification of State offices.

We are faced with determining the status of the Treasurer and Clerk of the City of Scottsboro, and the status of a member of the City Council. If all three are offices of profit under the State, the men who hold the offices of Clerk and Treasurer have vacated their offices on the City Council, and the municipal ordinance appointing Mrs. M. L. Wann as Tax Collector was invalid because it did not receive the four votes requisite to its proper approval. Authority for this contention is cited in Biennial Report of Attorney General, 1926-28, at page 108.

"If the holding of two offices by the same person at the same time is inhibited by the Constitution or the statute, a forbidden incompatibility is created similar in its effect to that of the common law, and as, in the case of the latter, it is well settled by an overwhelming array of authorities that the acceptance of a second office of the kind prohibited operates, ipso facto, to absolutely vacate the first office. *** It is the acceptance and qualification for the second office which vacates the first." Opinions, Attorney General, 1926, page 322, office file.

To determine the status of these municipal offices, let us examine chronologically the leading cases on the subject, which are apparently in conflict but which, we believe, may be harmonized.

The case of **Montgomery vs. State ex rel Enslen,** 107 Ala. 372, 18 So. 157, decided in 1894, held that the office of Police Judge of Birmingham was an office of profit under the State, since the administration of justice concerns the people of the state as a whole rather than only those of the community. The court lays down three tests for determining whether or not an office is one of profit under the State. They are: "(1) Whether the sovereignty, either directly or indirectly, as through a municipal charter is the source of authority. (2) Whether the duties pertaining to the position are of a public character; that is, due to the community in its political capacity. (3) Whether the tenure is fixed and permanent for a definite period fixed by law."

This case has been cited by previous opinions of this office as authority for the proposition that all municipal offices are State offices. This is not its specific holding. however, but merely an implication which has been deduced from the opinion.

In 1913, the Supreme Court decided in the case of **State ex rel. Wilkinson vs. Lane,** 181 Ala. 646, 62 So. 31, that members of the City Commission were not State officers, and that a circuit judge could, therefore, at the same time be a member of the City Commission. The Court applied the test laid down

in the Enslen case and concluded that duties of members of the City Commission are not of a public character, that is, due to the community in its political capacity. Mr. Justice DeGraffenried, in his opinion, gives a brief history of the theory of municipal government, which we shall do well to bear in mind in approaching the problem in our own case.

> "Municipal corporations are of a two-fold character—the one public, as regards the State at large, in so far as they are agents of government; the other private in so far as they are to provide local necessities and conveniences for their own communities. And the fact that the Legislature has blended the public and private functions of a municipal corporation in one grant of power does not destroy the clear and well-settled distinction between them. In its governmental character the corporation is made by the state a local depository of certain limited and prescribed political powers, to be exercised for the good of the state. In its proprietary character the theory is that the powers are not conferred chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual.
>
> "In truth, we do not see how, unless the historical development of municipal law is entirely discarded, it can be held upon sound reasoning that, in a state with a constitutional and statutory history like our own, a mere municipal officer can be held to be, within the meaning of our Constitution, an officer of the State.
>
> "The same municipal laws which were so well developed and so thoroughly understood in England and later in New England are the same municipal laws which prevailed in Alabama when it was only a territory, when it adopted its various Constitutions as a state, and is the same municipal law which prevails today. It is the same municipal which our ancestors brought with them from the parent country as a part of the English common law, and, in Alabama, a mere municipal officer is not, within the meaning of our Constitution, an officer of this state."

In 1929 in the case of **State ex rel Glenn vs. Wilkinson,** 220 Ala. 172, 124 So. 211, the Supreme Court held that the Assistant City Attorney of Birmingham was not an office of the State. The Court pointed out that his position is not specifically designated by the charter nor is his salary stipulated nor are his duties set out. He is rather an employee than an official. Here again the Court applies the test laid down in the Enslen case, and they say the office of Assistant City Attorney does not satisfy the third test as given in that case.

We now come to the question of whether or not the members of the City Council of Scottsboro are officials of the State, and also if the offices of Clerk and Treasurer of the City of Scottsboro are offices of profit under the State.

It has been decided in **State ex rel Wilkinson vs. Lane,** supra, that members of the City Commission were not State officials. We feel that this case is controlling and so hold that membership in the City Council of Scottsboro is not an office of profit under the State. We believe that this is an eminently satisfactory view, in the light of Mr. Justice DeGraffenried's discussion on the theory of municipal government given above. The offices of Treasurer and Clerk are provided for in the charter of the City of Scottsboro, found in Acts of Alabama, 1869-70, at page 33, the pertinent parts of which are given below:

"Section 4. Be it further enacted *** that the said corporate authorities shall have power to appoint a treasurer, assessor, clerk and marshal and such other subordinate officers as they may think necessary.

"Section 11. Be it further enacted, that the corporate authorities of the Town of Scottsboro shall appoint a **clerk**, whose duty it shall be to keep a record of their proceedings and publish the same and all ordinances and by-laws in some newspaper or in three public places in said town."

Now let us apply the test given in the Enslen case to these two offices.

There is no doubt that the sovereignty is the source of authority, coming through the charter.

The duties of Clerk and Treasurer are, however, not due to the community in its political capacity as set out by Judge DeGraffenried above.

The tenure of office is not fixed by law.

Therefore, the offices of Clerk and Treasurer do not meet the second and third tests as laid down by the Enslen case and they are not offices of profit under the State.

Since the members of the City Council are not officials of the State, and neither the office of Clerk nor Treasurer is such an office, it follows that when the Treasurer and Clerk were elected by the Council of which they were members, they did not vacate their offices as members of the City Council, under Section 280 of the Constitution of Alabama. Therefore, the ordinance appointing Mrs. M. L. Wann as Tax Collector for the City of Scottsboro was properly adopted, the Clerk and Treasurer properly voting as members of the City Council.

Since we have concluded that the City Treasurer is not an office of profit under the State, you may safely remit taxes which you have collected to the present City Treasurer; his appointment is of the same status as your appointment and is valid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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